# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 78.

R. M. HENNINGSEN AND EDWARD W. CLIVE, COPARTNERS; THE NATIONAL BANK OF COMMERCE OF SEATTLE, AND R. R. SPENCER, APPELLANTS,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND; SYLVESTER E. BROWN, DOING BUSINESS AS S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY; CARSTENS PACKING COMPANY; E. C. MacDOUGALL AND H. T. DINHAM, COPARTNERS AS E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE, AND THE C. B. SMITH COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED AUGUST 7, 1908.

(20,326.)

(20,326.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1906.**

## No. 361.

R. M. HENNINGSEN AND EDWARD W. CLIVE, COPARTNERS; THE NATIONAL BANK OF COMMERCE OF SEATTLE, AND R. R. SPENCER, APPELLANTS,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND; SYLVESTER E. BROWN, DOING BUSINESS AS S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY; CARSTENS PACKING COMPANY; E. C. MacDOUGALL AND H. T. DINHAM, COPARTNERS AS E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE, AND THE C. B. SMITH COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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*a* United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation), and R. R. SPENCER, Appellants,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Interveners SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company, BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation); CARSTENS PACKING COMPANY (a Corporation); E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

*Transcript of Record*

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, Appellee,

*vs.*

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants.

*Stipulation Relative to Printing of Record.*

It is hereby stipulated and agreed between the appellee, United States Fidelity and Guaranty Company of Baltimore, Maryland; the appellants, R. M. Henningsen and Edward W. Clives, copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer; and the interveners, Silvester E. Brown, (doing business as S. E. Brown & Company), Bryant Lumber and Shingle Mill Company, a corporation, Carstens Packing Company, a corporation, C. E. MacDougall and H. T. Dinham, copartners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company, that in printing the record on appeal the following parts of the transcript may be omitted, the same being immaterial to the questions to be raised upon such appeal:

| Date of Filing in Circuit Court. | Description of Omitted Part. |
|---|---|
| June 8, 1904. | Præcipe for appearance of complainant. |
| June 8, 1904. | Præcipe for process. |
| July 9, 1904. | Subpœna and return thereof. |
| July 12, 1904. | Præcipe for appearance of defendants. |
| Dec. 1, 1904. | Præcipe for appearance of interveners. |
| Dec. 29, 1904. | Two notices of hearing motions. |
| Jan. 5, 1905. | Cost-bill and notice. |
| Jan. 9, 1905. | Cost-bill and notice. |
| June 2, 1905. | Præcipe for transcript. |

The title of the court and cause in all papers subsequent to the bill of complaint.

Index of the clerk of the Circuit Court, for which should be substituted index to printed record prepared by clerk of United States Circuit Court of Appeals.

Dated at Seattle, Washington, this 30th day of June, 1905.

G. E. DE STEIGUER,
*Attorney for Appellants.*
JAMES B. MURPHY,
*Attorney for United States Fidelity and Guaranty Company of Baltimore, Maryland.*
GEO. A. HAWLEY,
*Attorney for Silvester E. Brown, Doing Business as S. E. Brown and Company.*
3 BALLINGER, RONALD, BATTLE & TENNANT,
*Attorneys for Bryant Lumber and Shingle Mill Company, a Corporation.*
KERR & McCORD,
*Attorneys for Carstens Packing Company, a Corporation, E. C. MacDougall and H. T. Dinham, Copartners, as E. C. MacDougall & Company.*
WM. HICKMAN MOORE,
*Attorney for W. O. Nelson, E. E. Caine, and the C. B. Smith Company, a Corporation.*

[Endorsed:] No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company of Baltimore, Maryland, *vs.* R. M. Henningsen *et al.* Stipulation Relative to Printing Record. Filed July 5, 1905. F. D. Monckton, Clerk.

4 In the United States Circuit Court, District of Washington, Northern Division.

No 1205.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, Complainant,

*vs.*

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE (a Corporation) and R. R. SPENCER, Defendants.

*Bill of Complaint.*

To the Honorable Judge of the Above-entitled Court:

The complainant for cause of action against the defendants, and each of them, alleges:

I.

That at all times herein mentioned, R. M. Henningsen and Edward W. Clive, were and still are copartners, contracting as such with the Government of the United States for the erection of certain buildings at Fort Lawton, in the State of Washington, and were and now are citizens and residents of the State of Washington.

5 II.

That at all of said times complainant was and now is a corporation, duly organized and existing, doing business under and by virtue of the laws of the State of Maryland, was and now is a citizen of the State of Maryland, and the defendant, the National Bank of Commerce, has been and now is a corporation, organized and existing under and by virtue of the laws of the United States, and doing business as a National Bank in the State of Washington, was and now is a citizen and resident of the State of Washington, and the defendant, R. R. Spencer, is, and at all such times has been its duly elected and qualified and acting manager and cashier, and has been, and is a citizen and resident of the State of Washington.

III.

That on or about the 12th day of May, 1903, the defendants, Henningsen and Clive, entered into a contract with the United States for the construction complete, at Fort Lawton, Washington, of four (4) certain buildings, fully described in said contract. That upon the execution of the said contract, the said defendants, were required to present with said contract a bond, conditioned amongst other things for the full completion of the said buildings, and for the full payment of the cost of all labor and materials entering into the con-

struction of said buildings, and that the said contractors exhibited the said contract to the complainant and applied to it to execute for them the said bond, and that the complainant in con-
6 sideration, among other things, of the law governing such cases, and especially the provisions of the United States Statutes making null and void any assignment or assignments, which said contractors might make of any sums becoming due them under said contract, and of the provisions in said contract for the retention by the United States of ten (10) per cent. of the total contract price named in said contract until the full completion and performance by the said contractors of said contract, consented to become surety for the said contractors, and did under date of May 15th, 1903, make, execute and deliver a bond to the United States, in which bond, the said contractors were principals and the complainant was their surety, said bond being in the full penal sum of eleven thousand six hundred and twenty-five ($11,625.00) dollars, a copy of which said bond is hereto attached, marked Exhibit "A," hereby referred to, and by such reference made to be a part hereof.

IV.

That said contractors, within a reasonable time after the execution of said contract, entered upon the performance of the same and incurred in the purchase of materials and in the employment of labor, many obligations in large sums, and the said contractors are now indebted to persons supplying and furnishing to them labor and materials in the prosecution of the said work, in the sum of about twenty thousand dollars, all of which indebtedness is long over due. That the said contractors have not kept and performed the terms of the said contract, in that they have not promptly made full
7 payment to all persons supplying and furnishing to them labor and materials in the prosecution of said work, and that they are in default of the payments of said sums.

V.

That it is provided in said contract that the United States shall reserve and withhold from said contractors ten per cent. of the total contract price for said buildings until the said work was fully completed and accepted by the United States, and that there is now in the hands of the United States the sum of about fourteen thousand ($14,000.00) dollars, which is a part of said contract price and which is justly applicable to the payment of the obligations incurred by the said contractors in the performance of said contract.

VI.

That some time subsequent to the execution by the complainant of said bond, and at a date unknown to the complainant, the said defendants, Henningsen and Clive, contrary to the statute of the United States in that behalf provided, made, executed and delivered to

the defendant, the National Bank of Commerce, or to the defendant, R. R. Spencer, as a trust and for the benefit of said bank, a pretended written assignment of all moneys due, or which might thereafter become due from the United States to the said contractors under and by virtue of the terms of the said contract. That as the complainant is informed and believes, and upon this information and belief alleges the fact to be, the said pretended assignment was made for the purpose of securing the payment to the said bank of some money obligation of the defendant, Henningsen, personally to said bank which said personal obligation has no relation to, or connection with the business of the said contractors as copartners and has no connection with, or relation to the said contract, but is a personal obligation of the said Henningsen of long standing, the validity and merits of which are unknown to complainant.

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## VII.

That by some arrangement entered into by the said contractors, the defendant Clive is now taking no active part in the performance of said contract, or in the transaction of business relating thereto, and the defendant Henningsen has sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and moneys due from the United States to the said firm on account of said contract, or any matters relating thereto. That the complainant is unable to state whether said copartnership has been dissolved, and does not know whether the payment, which is about to be made of the balance due under said contract, will be made to the said defendants, Henningsen and Clive, or to the defendant Henningsen, alone. That as the complainant is informed and believes, and upon its information and belief alleges the fact to be, the defendant Henningsen, or the defendants Henningsen and Clive, has or have agreed with the said bank that immediately upon receipt from the Quartermaster of the United States, stationed at Seattle, of the balance due under said contract, to wit, said sum of about fourteen thousand dollars, he, or they, will at once pay the said money to the said bank, or to the said Spencer for the said bank, and that in case said payment is made by check, he, or they, will at once indorse said check to and deliver the same to the said bank, or the said Spencer. That if the said money is paid to the said Henningsen & Clive, or the said Henningsen, he, or they, will at once deliver the said money either in kind by the indorsement or delivery of the check of the said Quartermaster for the said money to the said bank, or the said Spencer and the same will be at once applied by the said bank, or the said Spencer, to the payment of the said personal indebtedness of the said Henningsen, and the same will be wholly lost to the creditors of the said Henningsen and Clive who have furnished labor and materials in the performance of said contract, and to the complainant surety of said contractors. That the defendants, Henningsen and Clive, are, and each of them is, wholly insolvent,

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and they have not, and neither of them has, any property whatsoever subject to execution, or out of which the said creditors, or the complainant can realize any sum or sums whatsoever, save and except the balance due upon said contract.

VIII.

That for the purpose of protecting its rights upon the premises and the rights of said creditors, the complainant has heretofore filed with the Secretary of War of the United States, its written and sworn petition setting out all the facts hereinabove set
10 out, and praying that the said Secretary of War will disregard and instruct the subordinate officers of said Department and the Quartermaster's Department of the United States to disregard the assignment hereinabove referred to, and praying the said Secretary to cause the sums due or to become due the said contractors on account of said contract, to be applied to the payment of the indebtedness of the said contractors for labor and materials furnished for and used in the performance of said contract. That the complainant is informed, and upon information and belief alleges the fact to be, that notwithstanding such petition the Quartermaster of the United States Army, stationed at Seattle, will, at ten o'clock on the morning of June 9th, 1904, pay to the said contractors the full amount due on said contract, to wit, the sum of about fourteen thousand dollars. That if said balance is so paid to the said contractors, or either of them, they will, unless restrained by the order of this court, forthwith pay the same to the said bank, or the said Spencer, in payment of the said personal indebtedness of the said Henningsen, and the same will be wholly lost to the complainant, and to the said creditors of said contractors, and the complainant will be compelled to pay to the said creditors the full amount specified in said bond and will be unable to recover any part thereof from the said contractors; whereas, if the same be paid to the aforesaid creditors of the said contractors who have furnished such labor and supplies, the complainant will be compelled to pay, under its said bond to
11 the creditors of the said contractors, not more than the sum of seven thousand ($7,000) dollars; that owing to the insolvency of the said contractors, the complainant is wholly without any remedy against said contractors except such remedy as can be obtained in the Court of Equity and through the injunctive orders of said court.

Wherefore, the complainant prays:

1. That this court will, by its final decree herein, declare that the assignment above mentioned to the defendant, the National Bank of Commerce, or the defendant, R. R. Spencer, is null and void as against this complainant, and will, by its said decree and by its injunctive order, compel the payment by the defendants Henningsen and Clive of all the moneys to be received by them from the United States under said contract, to the creditors of said defendants who have furnished labor and materials for the construction of said buildings.

2. That pending the final determination of this cause this court will, by its order enjoining the defendants, and each and all or any of them, from receiving from the United States or from any official of the United States, any money on account of or in full payment of any balance due on the contract hereinabove mentioned, and will, by its order, enjoin the defendants, the National Bank of Commerce and R. R. Spencer, from receiving from the said Henningsen and Clive, or either of them, any money or check received by the said Henningsen and Clive, or either of them from the United States, or any officer thereof on account of, or in full payment of any balance due under said contract, and will,
12 by its mandatory order, require and compel the defendants, and each of them, to permit the full balance now due to the said Henningsen and Clive, or either of them, from the United States under said contract, to remain in the possession of the United States and its official representatives, pending the final determination of this cause.

3. That pending a hearing upon the application of the complainant for an injunction *pendente lite*, the court will, by its temporary restraining order, restrain the defendants, and each and all of them, from receiving from the United States, or from any officer or official representative thereof, and particularly from the Quartermaster of the United States Army stationed at Seattle, Washington, any sum of money whatever, or any check, or other order or warrant, for the payment of any sum of money whatever due from the United States to the said Henningsen and Clive, or either of them, on account of said contract, and restraining the defendants, the National Bank of Commerce and R. R. Spencer, from receiving from the said Henningsen and Clive, or either of them, any sum of money whatever, or any check, warrant or other order, for the payment of any sum of money whatever due from the United States to the said Henningsen and Clive, or either of them, on account of said contract, and will by its temporary mandatory order compel the defendants, and each and all of them to permit all moneys due or to become due from the United States to the said Henningsen and Clive, or either of them, to remain
13 in the possession of the United States, or its official representatives, pending the further order of this Court.

4. That complainant have such other and further relief by subrogation or otherwise, as it is in equity entitled to have, and that it recover its costs and disbursements from the defendants herein.

5. That the defendants, and each of them, be required to answer this bill of complainant, but not under oath, answer under oath being expressly waived.

CARR & PRESTON,
*Solicitors and Attorneys for Complainant.*

EXHIBIT "A."

*Contractor's Bond (Public Works).*

Know all men by these presents, that we, R. M. Henningsen and Edward W. Clive, copartners doing business under the firm name and style of R. M. Henningsen and Co., of Seattle, Washington, as principal, and The United States Fidelity and Guaranty Co., a corporation existing under the laws of the States of Maryland, as surety, are held and bound unto the United States of America, in the penal sum of eleven thousand six hundred and twenty-five ($11,625.00) dollars, to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-bounden R. M. Henningsen and Edward W. Clive, copart-
14 ners as aforesaid, have, on the twelfth day of May, 1903, entered into a contract with the United States, represented by G. S. Bingham, Major and Quartermaster, United States Army, at Seattle Washington, for the construction, complete, at Fort Lawton, Washington, of four (4) certain buildings.

Now, therefore, if the above-bounden R. M. Henningsen and Edward W. Clive, copartners as aforesaid, their heirs, executors, administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said R. M. Henningsen and Edward W. Clive to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instrument this 15th day of May, 1903; the name and corporate seal of said surety being hereto affixed and these presents duly signed by its attorney in fact pursuant to a resolution of its board of directors, passed on the 11th day of April, 1898, a copy of the record of which is on file in the War Department.

15 In presence of:

EDWARD G. WOOLT, (As to)
R. M. HENNINGSEN. [SEAL.]

HENRY C. EWING, (As to)
EDWARD W. CLIVE. [SEAL.]

Attest:

NORMAN LEWTON, } (As to Surety),
KARL LIVELY, }

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By J. L. HARTMAN, *Its Attorney in Fact.*

[Corporate Seal of U. S. F. & G. Co.]

DISTRICT OF WASHINGTON. *County of King, ss:*

E. M. Carr, being first duly sworn, upon oath deposes and says: I am one of the solicitors of the complainant, and make this affidavit because the said complainant is a corporation; I have read the above and foregoing complaint, know the contents thereof and believe the same to be true.

E. M. CARR.

Subscribed and sworn to before me this 8th day of June, 1904.

JAMES M. GEPHART,
*Notary Public in and for the State of Washington, Residing at Seattle.*

16 [Endorsed:] Bill of Complaint. Filed this 8th day of June, 1904. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

*Temporary Restraining Order.*

Upon the reading of the petition of the complainant in the above-entitled cause, and it appearing *prima facie* therefrom that the above-entitled plaintiff is entitled to a restraining order, and that an emergency exists which does not permit of the notice of an application for a restraining order:

It is hereby ordered and adjudged that the above-entitled defendants, Henningsen and Clive, and each of them, their agents and representatives, be and they are and each of them is hereby restrained from applying for or receiving from the United States or any officer thereof, and particularly from the Quartermaster of the United States Army stationed at Seattle, any payment or payments whatsoever, or any money, check, warrant or other order for the payment of any money, on account of their contract for the construction of certain buildings at Fort Lawton, which buildings are referred to and described in the bill of complaint in the above-entitled cause. And the said defendants, Henningsen and Clive, and each of them, and their agents and representatives, are and each of them is hereby enjoined and restrained from using,

17 appropriating, disposing of, or in any manner treating or dealing with any money or moneys or checks which shall have come into their possession, and be yet undisposed of, from the United States, or any officers thereof, for and on account of the said contract; and are restrained and enjoined from disposing of, using or in any manner treating or dealing with any money or moneys or checks, or thing of value, which may hereafter come into their possession, voluntarily or involuntarily upon their part, which shall in anywise apply or can in anywise be credited to their account, or the account of either of them, upon the said contract, or on account of any work done or services rendered by them or either of them in connection therewith.

And it is further ordered, considered and adjudged that the said defendants, R. R. Spencer and the National Bank of Commerce, their agents, representatives or servants, are and each of them is hereby enjoined and restrained from receiving from the United States, or from their said codefendants, or from any of them, or from any person or persons whomsoever, any check, money, voucher, or thing of value which may be given out or issued by the United States, or any officer thereof, which can in any manner be charged to the account of the said Henningsen and Clive, or the account of either of them, on account of their said contract. And the said defendants are and each of them is hereby enjoined and restrained, until further order of this court, from the commission of any acts whatsoever which will in anywise change, reduce or shift the obligation of the United
18 States, or any officer thereof, on account of the performance of the said contract by the said contractors. And the said defendants are and each of them is hereby commanded and enjoined to permit all moneys due or to become due to the said Henningsen and Clive, or either of them, on account of said contract, to remain in the possession of the United States and its officers, unappropriated and undisturbed and in nowise interfered with or dealt with by the defendants, or either of them, pending the further order of this court.

And it is further ordered, considered and adjudged that the said defendants and each of them be and they are hereby ordered to show cause, on the 20th day of June, 1904, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as the Court can consider the matter, at the United States Federal courthouse, at the northeast corner of Fourth Avenue and Marion Street, in the city of Seattle, King County, State of Washington, why a temporary injunction should not issue herein, restraining them from the commission of all acts herein referred to, pending the termination of the above-entitled action in the above-entitled court.

Dated Seattle, King County, Washington, this 8th day of June, A. D., 1904.

C. H. HANFORD, *Judge.*

[Endorsed:] Temporary Restraining Order. Filed this 8th day of June, 1904. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

19 *Return on Service of Writ.*

UNITED STATES OF AMERICA,
*Northern District of Washington, ss:*

I hereby certify and return that I served the annexed temporary restraining order with certified copy of complaint on the therein named R. M. Henningsen, by handing to and leaving a true and correct copy thereof with R. M. Henningsen, personally, at Seattle in said district on the 8th day of June, 1904.

C. B. HOPKINS,
*United States Marshal.*
By FRED M. LATHE, *Deputy.*

*Marshal's Fees.*

Service ..... $2.00
Mileage ..... .12

$2.12

Filed in the United States Circuit Court, District of Washington. Jun- 9, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

UNITED STATES OF AMERICA,
*Northern District of Washington, ss:*

I hereby certify and return that I served the annexed temporary restraining order with certified copy of compla-nt on the therein named Edward W. Clive, R. R. Spencer, Nat'l Bank of
20 Commerce (by R. R. Spencer, casheir), by handing to and leaving a true and correct copy thereof with each personally at Seattle in said District, on the 9th day of June, 1904.

C. B. HOPKINS,
*United States Marshal.*
By FRED M. LATHE, *Deputy.*

*Marshal's Fees.*

Service ..... $6.00

Filed in the United States Circuit Court, District of Washington. Jun- 9, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

[Title of Court and Cause.]

*Demurrer to Bill of Complaint.*

The demurrer of R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer to the bill of complaint of United States Fidelity and Guaranty Company of Baltimore, Maryland, complainant, these defendants, by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, or at all, do demur thereto and for cause of demurrer show: That there is no equity in said bill, and that the said complainant has not in and by its said bill made or stated such
21 a case as does or ought to entitle it to any such *discovery* or relief as is thereby sought and prayed for, from or against these defendants, or any of them.

Wherefore these defendants respectively demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

G. E. DE STEIGUER,
*Solicitor for the Defendants.*

STATE OF WASHINGTON, *County of King, ss:*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

G. E. DE STEIGUER,
*Solicitor for Defendants.*

STATE OF WASHINGTON, *County of King, ss:*

R. M. Henningsen, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing demurrer and verifies said demurrer on behalf of himself and his codefendants; that the foregoing demurrer is not interposed for the purpose of delay.

R. M. HENNINGSEN.

Subscribed and sworn to before me this 11th day of July, 1904.
[NOTARIAL SEAL.] FRANK P. LEWIS,
*Notary Public in and for the State of Washington, Residing at Seattle.*

22 Received copy of the within demurrer and service admitted this 12th day of July, 1904.

CARR & PRESTON,
*Attorneys for Plaintiff.*

[Endorsed:] Demurrer. Filed in the United States Circuit Court, District of Washington. July 12, 1904. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

[Title of Court and Cause.]

*Order Overruling Demurrer to Bill of Complaint.*

Now on this 25th day of July, 1904, this cause comes on to be heard upon defendant's demurrer to the complaint, the Court after hearing argument of respective counsel and being sufficiently advised in the premises, overrules said demurrer.

[Title of Court and Cause.]

*Joint and Several Answer.*

Of the Defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a Corporation, and R. R. Spencer, to the Complaint of the Complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland.

These defendants respectively now and at all times hereafter saving to themselves all and in all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the

many errors, uncertainties or imperfections in said complaint
23 contained, for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer thereto, answering, say:

1. These defendants admit that the defendants, R. M. Henningsen and Edward W. Clive, at the time of the making of the contract with the United States Government referred to in the complaint, became and were joint contractors for the performance of said contract, but deny that they were such copartners or continued to act as such joint contractors at the time of the making of the notes, loans or assignments hereinafter referred to, and aver that before the making of such notes, loans and assignments the said Edward W. Clive had withdrawn from all participation in the performance of said contract, and had agreed with the defendant Henningsen that said defendant Henningsen should thereafter perform the same under his sole supervision and direction and receive all checks and moneys thereafter due or to become due from the United States on account of said contract and the matters relating thereto, and admit that the said R. M. Henningsen and Edward W. Clive at all times in the complaint alleged were and still are citizens and residents of the State of Washington.

2. These defendants further admit that at the times alleged in the complaint the complainant was a corporation doing business under and by virtue of the laws of the State of Maryland and was and now is a citizen of the State of Maryland and that the defendant,
The National Bank of Commerce of Seattle, Washington,
24 during the said times was and still is a corporation organized and existing under and by virtue of the laws of the United States and doing business as a national bank in the State of Washington, and was and now is a citizen and resident of the State of Washington, and that the defendant, R. R. Spencer, during said times was and is the duly elected, qualified and acting cashier of said bank and as such, its cheif managing officer, though not entitled as manager, and was and is during said time a citizen and resident of the State of Washington.

3. Referring to paragraph three of the complaint, these defendants admit that on or about the 12th day of May, 1902, the defendants Henningsen and Clive entered into a contract with the United States for the construction at Fort Lawton, Washington, of four certain buildings described in said contract, and that the said Henningsen and Clive, together with the complainant, did make, execute and deliver to the United States a certain bond, a copy of which is attached to the complaint, marked "Exhibit "A," but deny that said bond was made, executed or delivered upon the consideration set forth in paragraph three of the complaint, or any — thereof, and allege that the consideration upon which said bond was made and delivered upon the part of the complainant was a certain sum or premium then and there paid by the said Henningsen and Clive to the complainant.

4. Referring to paragraph four of the complaint, these defendants

admit that there were at the time set forth various amounts
25 due on account of labor and material employed and furnished in the performance of said contract, amounting in all to about twenty thousand dollars; but deny that the said contract provided for the payment of the persons supplying and furnishing such labor and material, or any of them, of the amounts of their labor and material, or any thereof, and allege that said contract contains no provision whatsoever for the payment of laborers furnishing labor or persons furnishing material in the performance of said contract.

5. Referring to paragraph five of the complaint, these defendants allege that the total amount of the contract price to be paid for the buildings referred to in said contract was the sum only of forty-six thousand five hundred dollars ($46,500.00), and deny that any portion of said contract price, either the portion to be retained in accordance with said contract, or any other part whatsoever, is justly applicable, or applicable at all, to the payment of the obligations incurred by the said contractors in the performance of said contract, or any of them.

6. And further by way of answer to the complaint, and in particular to paragraph six thereof, the respondents say:

That heretofore, before the 10th day of October, 1903, the said Edward W. Clive had disposed of all his interests in the contract referred to in the petition, to his partner, the said R. M. Henningsen, and that the said Clive thereafter took no part in the performance of said contract or in the furnishing of labor or material there-
26 for, and the said Henningsen had the sole supervision and direction, including the furnishing of all money, labor and material incident to the performance of said contract; that on the 10th day of October, 1903, the said Henningsen, for the purpose of enabling him to perform the contract referred to in the petition and of enabling him to secure and pay for labor and material necessary to said performance, borrowed of the defendant, The National Bank of Commerce of Seattle, the sum of thirty-five hundred dollars, giving to said bank his promissory note payable on demand, for the amount of said loan, with interest thereon at the rate of eight per cent. per annum until paid, on which note no payments whatsoever have been made; that at the time of borrowing said money, the said R. M. Henningsen informed and promised said bank, one of the defendants herein, and informed said R. R. Spencer, its cashier, and the one who attended to the making of said loan that he desired said loan for the purpose of enabling him to perform his said contract, and that upon the issuance of his checks, drafts, or pay orders on said contract, he would cause the same to be delivered to the said Spencer for and on behalf of said bank and would cause the money realized therefrom to be paid to the said bank in so far as might be necessary for the purpose of repaying said loan, and that said money was so loaned to the said R. M. Henningsen for the purpose of enabling him to complete his said contract, and that the whole thereof was by him expended for, and was necessary to the performance of such contract, and that said bank loaned said money on
27 the faith and credit of the representations and promises of the said Henningsen as to the repayment of such loan from pay-

ments to be made upon said contract, and upon all his representations and promises hereinbefore set forth.

That thereafter, on or about the 16th day of March, 1904, and for the purpose of confirming his representations and promises hereinbefore set forth, and for the purpose of securing the repayment to said bank of such further sums of money as might be loaned to the said R. M. Henningsen for the purpose of carrying out his contracts for supplying labor and materials, said Henningsen made and delivered to the said R. R. Spencer, in trust for and for the use of said bank, an assignment of all payments then due or which might become thereafter due on account of his said contract referred to in the petition, and further made and delivered to the said Spencer in trust for and for the use of said bank an order addressed to Captain F. A. Grant, United States Quartermaster, at Seattle, Washington, requesting him to deliver checks for any and all balances due on account of said contract to the said R. R. Spencer, which said assignment and which said request were both signed by the said R. M. Henningsen for and as the act of himself, the said R. M. Henningsen, and the said Edward W. Clive, and signed by the said firm name of R. M. Henningsen & Co., which said request was on the 18th day of March, 1904, delivered to the said Captain F. A. Grant, United States Quartermaster at Seattle, Washington, together with
28 a letter from said R. R. Spencer referring thereto and stating that the same was inclosed, which said request of the said R. M. Henningsen & Co. and letter of said Spencer are now on file in the office of the said Quartermaster, and of which, as these respondents believe, due notice has been given to the War Department at Washington, D. C.

That thereafter, on the 2d day of April, 1904, on the faith and credit of said assignment and request hereinbefore set forth, and for the purpose of enabling the said R. M. Henningsen to pay for labor and material to be furnished on said contract, said bank further loaned to the said R. M. Henningsen the sum of one thousand dollars, taking his note therefor, with interest thereon at eight per cent. per annum, from April 2, 1904, payable on demand, on which note no payments whatsoever have been made; that at the time of securing said loan, the said R. M. Henningsen represented to said bank and to said R. R. Spencer, as its cashier, that said money was furnished for the purpose of paying for materials and labor in the performance of said contract, and promised and agreed with said bank that said loan should be repaid from the balance due or to become due to him upon said contract, and said bank made said loan upon the faith and credit of the assignment, request and promise and agreement of the said R. M. Henningsen hereinbefore set forth, and said money so loaned was all actually and necessarily used in the payment of labor and material in the performance of said contract.

That thereafter, upon the 14th day of May, 1904, said
29 bank, upon the faith and credit of said assignment and request, further loaned to the said R. M. Henningsen the sum of three hundred seventy dollars, taking his note for said sum, with interest from May 14, 1904, at the rate of eight per cent. per annum, upon

which note no payments whatsoever have been made, and which said note was payable on demand, and that said money was so loaned upon the faith and credit and in reliance upon the assignment and request of the said Henningsen hereinbefore referred to, and upon the further statement of the said Henningsen made by him at the time of securing said loan, that said money was secured for and would be used in the payment of labor and material for the performance of said contract, upon all of which said representations said *Bank relief* in the making of said loan, and these defendants say that said money was actually necessary and was actually and necessarily used for the payment of labor and material used in the performance of said contract.

These defendants further say that said bank has no other security whatsoever for the repayment of said loan, and that the whole thereof is justly due, owing and unpaid as evidenced by the said notes, all signed by the said R. M. Henningsen, and that all the money advanced upon said loans was necessarily secured by the said Henningsen in order to enable him to complete said contract and that without the same said contract could not have been completed.

These defendants further say that if said sums of money hereinbefore referred to had not been loaned to the said R. M. Hen-
30 ningsen, he would have been unable to complete the performance of his said contract, and that either the same would have been left only partially performed, to the great loss and damage of the United States, or it would have been necessary for the complainant herein to have completed the contract to its own great loss and damage, and that the complainant and the Government of the United States has fully received thereby the benefit of all said loans hereinbefore set out and made by said bank to said R. M. Henningsen; and these defendants further deny that the assignments and orders hereinbefore referred to were contrary to the statutes of the United States, and deny that the debt thereby secured has no connection with the business of the said contract hereinbefore referred to, and deny that the same is of long standing and to the contrary allege that the same is as hereinbefore set forth.

7. Referring to paragraph seven of the complaint, these defendants admit that at the time therein referred to, the defendant Clive was taking no part in the performance of said contract, or in the transaction of business relating thereto, and that the defendant Henningsen had the sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and money due from the United States on account of said contract, or any matters relating thereto. And these defendants allege that prior to the 10th day of October, 1903, the copartnership between the said Henningsen and said Clive had been dissolved, and that the said Henningsen alone proceeded in the performance of said contract ,and had, alone,
31 the right, separate and apart from the said Clive, to receive the contract price, and that at the time of the making of the complaint herein, the said Henningsen was alone to receive the payment of said purchase price, and that it had been agreed by the said Henningsen, that immediately upon the receipt from the Quarter-

master of the balance due upon said contract, to wit, the sum of about fourteen thousand dollars, the same was to be paid to the said Spencer, in so far as necessary to pay the indebtedness owing to said bank as hereinbefore set forth, and that it had been agreed that any check made or issued upon such payment should be at once endorsed and delivered to the said Spencer, and admit that the same, in so far as necessary, was about to be applied upon the indebtedness of the said Henningsen to said bank hereinbefore set forth; but deny that the balance of said money so to be paid upon said contract, beyond what was necessary to the payment of the indebtedness owing to said bank as hereinbefore set forth, was to be diverted from or lost to the creditors who had furnished labor and materials in the performance of said contract, or to the complainant herein, but aver to the contrary that the balance of said money beyond what was necessary to pay the indebtedness owing to said bank was to be applied in the payment of such claims for labor and materials.

8. Referring to paragraph eight of the complaint, these defendants admit the making and filing with the Secretary of War of the petition therein referred to, and admit that notwithstanding said
32 petition, the Quartermaster of the United States at Seattle, Washington, was about, at the time set forth in the complaint, to make full payment to the said R. M. Henningsen of the amount due upon said contract, to wit, of the sum of about fourteen thousand dollars, and that the said R. M. Henningsen, upon receipt of the same was about to pay the same to the said Spencer, and that the said Spencer was about to apply the same, in so far as might be necessary, to the payment of the indebtedness to said bank, but deny that these defendants, and in particular the said Spencer, or the said bank, upon the payment of said money to said Spencer were about to, or intended to, apply any portion thereof, beyond the amount necessary to pay the indebtedness of the said R. M. Henningsen to said bank referred to hereinbefore, to any other purpose than the payment of claims for labor and material arising out of said contract. And these defendants further allege that the Secretary of War and the officials of the War Department, and the officers of the Quartermaster's Department at Seattle, Washington, had all elected and decided to pay the balance upon said purchase price, to wit, the sum of fourteen thousand dollars, to the said R. M. Henningsen.

Wherefore, these defendants pray that said bill of complaint be dismissed, and that these defendants go hence with their costs most wrongfully sustained, and for such other relief and protection of their rights as may be equitable and according to good conscience.

G. E. DE STEIGUER,
*Solicitor for the Defendants.*

33 Service of within answer and receipt of a copy thereof admitted this 23rd day of Sept., 1904, and signature of defendants waived.

CARR & PRESTON,
*Att'y. U. S. F. & G. Co.*

[Endorsed:] Filed in the United States Circuit Court, District of Washington, Sept. 23, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

[Title of Court and Cause.]

*Demurrer to Answer.*

Now comes the above-named complainant, United States Fidelity and Guaranty Company, of Baltimore, Maryland, and demurs to the first, second, third, fourth, fifth, sixth, seventh and eighth paragraphs of the joint and several answer of the defendants above named filed in this cause, and for grounds of demurrer states the following:

I.

That the said paragraphs of said answer do not state facts sufficient to constitute any defense to the cause of action set forth in complainant's complaint filed in this cause.

II.

That the facts set forth in said paragraphs of said answer are insufficient in law to constitute any defense to complainant's cause of action.

34 Wherefore, complainant prays the judgment of this Court whether it shall make any other or further reply to said answer.

CARR & PRESTON,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA,
*State of Washington, County of King,* ss:

I, H. C. Ewing, being first duly sworn according to law, depose that I am the agent and attorney in fact of the United States Fidelity and Guaranty Company of Baltimore, Maryland, the complainant in this suit, and make this verification in behalf of said complainant, because it is a foreign corporation, and has no officer within the State of Washington, and that the foregoing demurrer is not interposed for delay.

HENRY C. EWING.

Sworn to before me and subscribed in my presence this 12th day of October, A. D. 1904.

[NOTARIAL SEAL.] W. M. WILLIAMS,
*Notary Public in and for the State of Washington, Residing at Seattle, Washington.*

I, E. M. Carr, of counsel for complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland, do hereby certify

that the foregoing demurrer is, in my opinion, well founded in point of law.

Seattle, Washington, October 12th, 1904.

E. M. CARR.

35 Received copy of the within demurrer and service of the same admitted this 12th day of Oct., 1904.

G. E. DE STEIGUER,
*Solicitor for Defendants.*

[Endorsed.] Demurrer to Answer. Filed this 14th day of Oct., 1904. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

*Petition in Intervention and Bill in Intervention.*

The petition for leave to intervene and the bill of intervention therefor of Sylvester E. Brown, doing business as S. E. Brown & Company of Seattle, Washington, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber and Shingle Mill Company, a corporation organized under the laws of the State of Washington, W. O. Nelson, The C. B. Smith Company, a corporation, and E. E. Caine, exhibited against the United States Fidelity and Guaranty Company of Maryland, complainant, and R. M. Henningsen and Edward Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, defendants:

S. E. Brown & Company, E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber and Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith Company, a corporation, and E. E. Caine, bring this, their petition, for leave to intervene, and present this, their bill of intervention,
36 leave thereto being first had, and thereupon the petition shows:

To the Honorable Judge of the Circuit Court of the United States for the District of Washington, Northern Division, Sitting in Equity:

I.

That they and each of them are creditors of the above-named defendants, R. M. Henningsen and Edward W. Clive in the various amounts and in the manner hereinafter more particularly stated. That they are the creditors or some of the creditors referred to in the bill of complaint filed herein by the plaintiff and referred to in the answer filed herein by the defendants.

II.

Your petitioners further represent and show unto your Honor that the said Henningsen and Clive entered into a contract as al-

leged in the complaint herein, with the United States Government, to perform work at Fort Lawton as in said complaint alleged. That the said contract provided, among other things, that the same should not be assigned or transferred. That to secure the faithful performance of said contract, the said Henningsen and Clive made, executed and delivered a bond in the sum of $11,625, upon which bond the complainant herein became surety. That the said bond was duly delivered to the United States, and by its proper officer or agent approved, and thereby became operative and effective. That each of your petitioners herein furnished labor and material
37 which was proper, and did enter into the construction of the work at Fort Lawton provided for under said contract and referred to in the complaint herein, and which constitutes the basis of your petitioners' demands against the defendants Henningsen and Clive or R. M. Henningsen, and the complainant herein, United States Fidelity and Guaranty Company.

III.

Your petitioners further represent and show unto your Honor, that after the filing of the complaint herein, and before the filing of the answer herein by the defendants, the said complainant and the defendants entered into some sort or manner of agreement, the exact terms of which are unknown to your petitioners, wherein and whereby it was agreed that the Quartermaster of the United States Army, located at Seattle, should deliver to the said defendant Henningsen, payable to his order, a voucher or check for the payment of the balance due upon said contract, to wit, the sum of $14,000.00, as alleged in the complaint herein; and that he, the said Henningsen, should at once endorse and deliver the same to the above-named defendant, R. R. Spencer, for the following purposes: That he, the said R. R. Spencer, should reserve out of said fund a sufficient amount to pay to himself or to The National Bank of Commerce, the various sums alleged in defendants' answer to be due to the bank or to R. R. Spencer, as its cashier, from the said defendants Henningsen and Clive or the defendant Henningsen, and that the balance should be distributed among the various creditors of the said Henningsen and Clive, or the said
38 Henningsen, who had supplied labor and material in the execution of the contract referred to, and that the moneys so reserved by the said Spencer should be held by him to await the results of this action.

IV.

Your petitioners further represent and show unto your Honor, that afterwards, the said Quartermaster did make and deliver to said Henningsen a voucher or check payable to the order of the said Henningsen, for the said amount of about $14,000, and that he, the said Henningsen, did deliver the same to the said R. R. Spencer, for the uses and purposes hereinabove set forth. That the said Spencer received the money thereon, and did, out of said fund,

pay to the said creditors certain sums of money upon their respective claims, due them from the said Henningsen and Clive or the said Henningsen, but reserved to himself for the use of himself or for the use of the defendant National Bank of Commerce, a large sum of money, to wit, the sum of $5,500.00, to be so reserved until the determination of this action, and to be disposed of as the Court might determine herein.

V.

Your petitioners further represent and show unto your Honor that there is due to creditors of the said Henningsen and Clive or the said Henningsen, a large amount of money, to wit, about the sum of $16,000, for labor and material supplied for the completion of the contract at Fort Lawton hereinabove referred to, and that the amount so reserved by the said R. R. Spencer is not sufficient to pay them in full.

39 VI.

Your petitioners further represent and show unto your Honor that the complainant herein, the United States Fidelity and Guaranty Company, being the surety upon the bond of the said Henningsen and Clive, as herein alleged, and as in said complaint and answer admitted, are liable to these interveners for all deficit which may be due them after the exhausting of the funds arising out of the contract itself, including the money so reserved by the said R. R. Spencer, if it should be adjudged that the said last mentioned money is available and applicable to the payment of your petitioner's debts.

VII.

Your petitioners further represent and show unto your Honor, that the various claims are as follows, after allowing to the said Henningsen and Clive, or the said Henningsen, the benefit of all credits, deductions and setoffs, the various sums, to wit:

To Sylvester E. Brown, the sum of $2,080.21; and that the same has been reduced to judgment in the Superior Court of the State of Washington, for the County of King, against the said R. M. Henningsen.

To E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, the sum of $1,098.00.

To Bryant Lumber and Shingle Mill Company, a corporation, the sum of $5,321.83.

Carstens Packing Company, a corporation, $80.00.

To W. O. Nelson, the sum of $1,209.40.

40 To The C. B. Smith Company, a corporation, the sum of $2,118.10.

To E. E. Caine, the sum of $128.86.

VIII.

Your petitioners further represent and show unto your Honor, that they are informed and believe, and upon such information and belief aver the fact to be, that the complainant herein, at the time of entering into the execution of said bond, took and exacted of the said Henningsen and Clive and the said Henningsen ample security for any liability which the said complainant might be called upon to meet on account of said bond, and now holds said security, the same being the assets of the said Henningsen and Clive and the said Henningsen, to secure and make whole the said complainant on account of any sums which it might have to pay by reason of said bond.

IX.

Your petitioners further represent and show unto your Honor that the said defendants Henningsen and Clive and each of them are wholly insolvent, and that your petitioners have no adequate remedy at law only in a court having equity jurisdiction where such matters are properly relievable and cognizable.

Wherefore your petitioners pray that the petition of interveners may be filed, and that an order may be made and entered herein, adjudging and decreeing that the money so reserved by the said R. R. Spencer as above alleged, is a proper fund and properly
41 applicable to the payment of your petitioners' said claims, or so much thereof as may be necessary therefor, and that should there not be sufficient of said fund to pay your petitioners in full that then an order may be entered herein, adjudging and decreeing that the said United States Fidelity and Guaranty Company of Maryland is liable for the balance of said deficit (not exceeding the penalty of its said bond), and shall pay the same or so much thereof as may be necessary therefor, not, however, exceeding the penalty in said bond referred to, to wit, $11,625.00.

And your petitioners further pray that a proper allowance may be made herein for all costs by them incurred in and about this petition; for a reasonable attorney's fee herein, and for such other and further relief as to the Court may seem meet and equitable and proper in the premises.

And that an order may be entered requiring the United States Fidelity and Guaranty Company of Baltimore, Maryland, complainant, and defendants, R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, to enter their appearance to this intervening bill and to answer the same and show cause, if any they have why the prayer of this bill of intervention should not be granted, and that in said order to show cause the said complainant and the said defendants may be cited to appear herein and answer this intervening bill, but not under oath, under oath or affirmation being hereby ex-
42 pressly waived; and that the Court may be pleased to submit to a master for that purpose the taking of testimony, if any be necessary, upon any issues which may be joined upon the answers

hereto, and that the relief hereinbefore prayed for may be granted to interveners.

And your petitioners will ever pray.

S. E. BROWN,
By GEO. A. HAWLEY, *His Att'y,*
BYANT LUMBER AND SHINGLE MILL CO.,
By BALLINGER, RONALD & BATTLE, *Its Att'ys,*
CARSTENS PACKING CO.,
E. C. McDOUGALL & CO.,
By KERR & McCORD, *Their Att'ys,*
W. O. NELSON,
E. E. CAINE,
THE C. B. SMITH CO., A CORP.,
By WM. HICKMAN MOORE,
*Their Att'y., Petitioners.*

GEO. A. HAWLEY,
BALLINGER, RONALD & BATTLE,
KERR & McCORD,
WM. HICKMAN MOORE,
*Attorneys for Petitioners.*

43 UNITED STATES OF AMERICA,
*District of Washington, ss:*

S. E. Brown, being first duly sworn, on oath says: That he is one of the petitioners in the foregoing petition; that he has heard the same read, knows the contents thereof, and believes the same to be true; that he makes this affidavit for himself and on behalf of his copetitioners.

S. E. BROWN.

Subscribed and sworn to before me this 28th day of November, A. D. 1904.

A. J. TENNANT,
*Notary Public in and for Washington,*
*Residing at Seattle.*

[Endorsed:] Petition in Intervention. Filed in the United States Circuit Court, District of Washington, Dec. 1, 1904. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

[Title of Court and Cause.]

*Order to Show Cause.*

Now on this 1st day of December, 1904, there is exhibited to the Court the proposed bill of intervention of Sylvester E. Brown, doing business as S. E. Brown & Company, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Bryant Lum-

ber and Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith Company, a corporation, Carstens Packing Com-
44 pany, a corporation, and E. E. Caine, against the complainant in this suit, United States Fidelity and Guaranty Company of Baltimore, Maryland, and the defendants thereto, R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, with the petition praying for leave to intervene under the said bill and file the said bill of intervention as such, and for an order to show cause thereon, and thereupon the Court being fully advised in the premises, it is ordered that the said S. E. Brown & Company, E. C. McDougall & Company, Bryant Lumber and Shingle Mill Company, W. O. Nelson, The C. B. Smith Company, a corporation, Carstens Packing Company, a corporation, and E. E. Caine, have leave to intervene by their said bill, and file the said bill of intervention, and the same being filed—

It is now ordered, that the United States Fidelity and Guaranty Company, complainant, and the said R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce, a corporation, and R. R. Spencer, being served ten (10) days prior to the return day hereof with a copy of the said intervening bill and of this order, whether so served in person or by service upon the solicitors of record of the said parties, show cause on the 21st day of December, 1904, at chambers, at Seattle, Washington, why a decree should not pass herein on the intervening bill as prayed for therein.

It is further ordered that a service of the copy of this order together with a copy of the said intervening bill upon the
45 solicitors of record for the said complainant and the said defendants and each of them shall be a sufficient service hereof to entitle the Court to proceed herein and adjudicate upon the said intervening bill in accordance with the prayer thereof; and the respondents to said bill, if not so served ten days before the return day thereof, shall make showing as now ordered before the expiration of ten days from the date of such service.

Dated this 1st day of December, 1904.

C. H. HANFORD, *Judge.*

[Endorsed:] Order to Show Cause. Filed in the United States Circuit Court, District of Washington. Dec. 1, 1904. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

[Title of Court and Cause.]

*Motion to Strike Bill of Intervention.*

To the Judge of the Above-entitled Court:

The defendants, in obedience to the order to show cause heretofore, on the 1st day of December, 1904, made herein, hereby enter their appearance to the bill of intervention filed herein on the said 1st day of December, 1904, by E. C. McDougall & Company and the other interveners named in said bill, and respectfully move this Court that the order heretofore on the said 1st day of December, 1904, made

and entered herein, permitting said interveners to file said bill of intervention, be vacated and set aside, and that the said bill
46 of intervention be stricken from the files of this court upon the following grounds:

1st. That the order permitting the filing of said bill of intervention was made *ex parte* and *pro forma*.

2d. That by reason of the fact, as appears upon the face of the said bill of intervention, that the said interveners and each of them are residents and citizens of the State of Washington, and that the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce, and R. R. Spencer, are each and all residents and citizens of the State of Washington, this court has no jurisdiction to entertain the said bill of intervention.

3d. That it appears upon the face of said bill of intervention that no legal or equitable grounds of intervention exist in favor of the said interveners or any of them.

In the event that the above motion should be denied by the Court, the said defendants further move that the said bill of intervention be dismissed as to the interveners, E. C. McDougall & Company, Carstens Packing Company, W. O. Nelson and E. E. Caine, for the reason that the amount in controversy between each of the said interveners and the complainant and the defendants herein is less than two thousand dollars, and that the amount in controversy between any one of said interveners and the complainant and defendants herein does not exceed the sum of two thousand dollars.

G. E. DE STEIGUER,
*Attorney for Defendants.*

47 Receipt of a copy and due service hereof admitted this 20th day of December, 1904.

GEO. A. HAWLEY,
BALLINGER, RONALD & BATTLE,
KERR & McCORD,
W. H. MOORE,
*Attorneys for Interveners,*
By GEO. A. HAWLEY.

[Endorsed:] Motion to Strike Bill of Intervention. Filed in the United States Circuit Court, District of Washington. Dec. 28, 1904. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

[Title of Court and Cause.]

*Motion to Strike Bill of Intervention.*

To the Judge of the Above-entitled Court:

The complainant, the United States Fidelity and Guaranty Company of Maryland, in obedience to the order to show cause heretofore on the 1st day of December, 1904, made herein, hereby enters its

appearance to the bill of intervention filed herein on the said 1st day of December, 1904, by E. C. McDougall & Company and the other interveners named in said bill, and respectfully moves this court that the order heretofore on the said 1st day of December, 1904, made and entered herein, permitting said interveners to file said bill of intervention, be vacated and set aside, and that the said
48 bill of intervention be stricken from the files of this court upon the following grounds:

1st. That the order permitting the filing of said bill of intervention was made *ex parte* and *pro forma*.

2d. That by reason of the fact, as appears upon the face of the said bill of intervention, that the said interveners and each of them are residents and citizens of the State of Washington, and that the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce and R. R. Spencer, are each and all residents and citizens of the State of Washington, this Court has no jurisdiction to entertain the said bill of intervention.

3d. That it appears upon the face of said bill of intervention that no legal or equitable grounds of intervention exist in favor of the said interveners or any of them.

In the event that the above motion should be denied by the Court, the said complainant further moves that the said bill of intervention be dismissed as to the interveners, E. C. McDougall & Company, Carstens Packing Company, W. O. Nelson and E. E. Caine, for the reason that the amount in controversy between each of the said interveners and the complainant and defendants herein is less than $2,000.00, and that the amount in controversy between any one of said interveners and the complainant and defendants herein does not exceed the sum of $2,000.00.

CARR & PRESTON,
*Solicitors for Complainant.*

49 Received copy of the within motion and service of the same admitted this 20th day of Dec., 1904.

BALLINGER, RONALD & BATTLE,
*Attorneys for Bryant Lumber & Shingle Co.*
KERR & McCORD,
*Attorneys for Carstens Packing Co. and E. C. McDougall & Co.*
WM. HICKMAN MOORE,
*Attorney for W. O. Nelson, E. E. Caine and C. B. Smith Co.*
GEO. A. HAWLEY,
*Attorney for S. E. Brown.*

[Endorsed:] Motion to Strike Bill of Interveners. Filed in the United States Circuit Court, District of Washington. Dec. 31, 1904. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

*Order Granting Motion to Strike Bill of Intervention.*

This day came on regularly for hearing the motion of the complainant herein and the motion of the defendants herein to strike from the files of this court the bill of intervention of Sylvester E. Brown, doing business as S. E. Brown & Company, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber & Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith
50 Company, a corporation, and E. E. Caine; the complainant appearing by its attorneys, Messrs. Carr & Preston, and the defendants appearing by their attorney, G. E. de Steiguer, Esq., and said interveners appearing by their attorneys, George Hawley, Esq., and William Hickman Moore, Esq., and it appearing to the Court from said bill of intervention and upon the face thereof that no legal or equitable grounds of intervention exist in favor of the said interveners, or any of them; and it further appearing to the Court from said bill of intervention that said interveners have not, and none of them has, any lien upon or against or right to the fund which said interveners seek to have paid to them, said fund being a certain amount heretofore paid to The National Bank of Commerce of Seattle, and being a portion of the sum paid upon a contract of the defendants Henningsen and Clive with the United States Government for certain work at Fort Lawton:

Now, therefore, the Court being fully advised, and having jurisdiction in the premises, grants said motion, by reason whereof it is hereby ordered, adjudged and decreed that said bill of intervention be, and the same is hereby, dismissed and stricken from the files of this court.

It is further ordered and adjudged that the complainant recover of and from the interveners, Sylvester E. Brown, doing business as S. E. Brown & Company, E. C. McDougall and H. T. Dinham, copartners as E. C. McDougall & Company, Carstens Packing Company, a corporation, Bryant Lumber & Shingle Mill Company, a corporation, W. O. Nelson, The C. B. Smith Company, a
51 corporation, and E. E. Caine, and each of them, the costs of the said intervention to be taxed.

Done in open court this 5th day of January, 1905.

C. H. HANFORD, *Judge*.

[Endorsed:] Order Granting Motion to Strike Bill of Intervention. Filed this 5th day of Jan., 1905. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

*Amended and Supplemental Bill of Complaint.*

To the Honorable Judges of the Above-entitled Court:

The complainant for an amended and supplemental bill of complaint, filed herein by the consent of the defendants, alleges:

I.

That at all times herein mentioned, the defendants R. M. Henningsen and Edward W. Clive were and still are copartners, contracting as such with the Government of the United States for the erection of certain buildings at Fort Lawton, in the State of Washington, and were and now are citizens and residents of the State of Washington.

II.

That all of said times complainant was and now is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Maryland, and was and now is a citizen of the State of Maryland; and the defendant, The National
52 Bank of Commerce, has been and now is a corporation organized and existing under and by virtue of the laws of the United States and doing business as a National Bank in the State of Washington, and was and now is a citizen and resident of the State of Washington; and the defendant, R. R. Spencer, is and at all such times has been its duly elected and qualified and acting manager and cashier, and has been and now is a citizen and resident of the State of Washington.

III.

That on or about the 12th day of May, 1903, the defendants Henningsen and Clive entered into a contract with the United States for the construction, complete, at Fort Lawton, Washington, of four (4) certain buildings fully described in said contract. That a copy of said contract is hereunto attached, marked Exhibit "A," and hereby referred to and by such reference made a part hereof. That upon the execution of the said contract, the said defendants were required to present, with said contract, a bond, conditioned, among other things, for the full completion of the said buildings and for the full payment of the cost of all labor and materials entering into the construction of said buildings, and that the said contractors exhibited the said contract to the complainant and applied to it to execute for them the said bond; and that the complainant, in consideration among other things of the law governing such cases, and especially the provisions of the United States Statutes and of said contract making null and void any assignment or as-
53 signments which said contractors might make of any sums becoming due them under said contract, and of the pro-

visions in said contract for the retention by the United States of twenty per cent. (20%) of the total contract price named in said contract until the full completion and performance by the said contractors of the said contract, consented to become surety for the said contractors, and did under date of May 15th, 1903, make, execute and deliver a bond to the United States, in which bond the said contractors were principals and the complainant was their surety, said bond being in the full penal sum of eleven thousand six hundred and twenty-five dollars ($11,625.00), a copy of which said bond is hereto attached, marked Exhibit "B," hereby referred to and by such reference made a part hereof.

IV.

That said contractors, within a reasonable time after the execution of said contract, entered upon the performance of the same and incurred, in the purchase of materials and in the employment of labor, many obligations in large sums, and the said contractors were, at the time the bill of complaint was filed herein, indebted to persons supplying and furnishing to them labor and materials in the prosecution of the said work, in the sum of more than twenty thousand dollars, and are now so indebted in the sum of more than thirteen thousand dolars, all of which indebtedness is long overdue. That the said contractors have not kept and performed
the terms of the said contract, in that they have not promptly
54 made full payment to all persons supplying and furnishing
to them labor and materials in the prosecution of said work, and that they are in default in the payment of said sums.

V.

That it is provided in said contract that the United States shall reserve and withhold from the said contractors twenty per cent. (20%) of the total contract price for said buildings until the said work was fully completed and accepted by the United States, and that there was, at the time this suit was commenced, in the hands of the United States twenty per cent. of said contract price and other sums due on said contract, in all the sum of about fourteen thousand dollars ($14,000), which was and is a part of said contract price and which was and is justly applicable to the payment of the obligations incurred by the said contractors in the performance of said contract.

VI.

That some time subsequent to the execution by the complainant of said bond, and at a date unknown to complainant, the said defendants Henningsen and Clive, contrary to the statute of the United States in that behalf provided, and contrary to the provisions of said contract, made, executed and delivered to the defendant, The National Bank of Commerce or to the defendant R. R. Spencer, as a trustee and for the benefit of said bank, a pretended written assignment of all moneys due or which might

thereafter become due from the United States to the said
55 contractors under and by virtue of the terms of the said contract. That as the complainant is informed and believes, and upon such information and belief alleges the fact to be, the said pretended assignment was made for the purpose of securing the payment to the said bank of some money obligation of the defendant Henningsen personally to said bank, which said personal obligation had no relation to or connection with the business of the said contractors as copartners, and had no connection with or relation to the said contract, but is a personal obligation of the said Henningsen of long standing, the validity and merits of which are unknown to complainant.

## VII.

That by some arrangement entered into by the said contractors, the defendant Clive is now taking no active part in the performance of said contract, or in the transaction of business relating thereto, and the defendant Henningsen has, and has had, sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and moneys due from the United States to the said firm on account of said contract, or any matters relating thereto. That the complainant is unable to state whether said copartnership has been dissolved, and at the time this suit was begun did not know whether the payment which was about to be made, of the balance due under said contract, would be made to the said defendants Henningsen and Clive or to the defendant Henningsen alone. That as the complainant was informed and believed, and upon such information and belief alleged the fact to be, the
56 defendant Henningsen or the defendants Henningsen and Clive had agreed with the said bank that immediately upon the receipt from the Quartermaster of the United States, stationed at Seattle, of the balance due under said contract, to wit, said sum of about fourteen thousand dollars, he or they would at once pay the said money to the said bank, or to the said Spencer for the said bank, and that in case said payment was made by check, he or they would at once indorse said check to and delivered the same to the said bank or to the said Spencer, and that if the said money was paid to the said Henningsen and Clive or the said Henningsen, he or they would at once deliver the said money, either in kind or by the indorsement or delivery of the check of th- said Quartermaster for the said money, to the said bank or to the said Spencer, and the same would be at once applied by the said bank or the said Spencer to the payment of the said personal indebtedness of the said Henningsen, and the same would be wholly lost to the creditors of the said Henningsen and Clive who had furnished labor and materials in the performance of said contract, and to the complainant surety of said contractors, and that the defendants Henningsen and Clive were and each of them was wholly insolvent, and they have not and neither of them had any property whatsoever subject to execution, or out of which the said creditors or

the complainant could realize any sum or sums whatsoever, except and save the balance due upon said contract.

57 VIII.

That after the commencement of this suit, and after service of process herein upon the defendants, and after the issuance of the restraining order issued by this Honorable Court upon the filing of the original bill of complaint herein, restraining the defendants Henningsen and Clive from receiving from the Quartermaster of the United States the moneys hereinabove referred to, and restraining the defendants, The National Bank of Commerce and R. R. Spencer, from receiving said money or any part thereof from the said defendants Henningsen and Clive, all of the parties hereto entered into a stipulation in writing regarding the rights of the respective parties hereto and regarding the disposition of the moneys hereinbefore referred to, a full, true and correct copy of which stipulation is hereunto attached, marked Exhibit "C," and hereby referred to and by such reference made a part hereof.

IX.

That upon making the written stipulation hereinabove referred to, the same was executed by the parties thereto, and $8,024.21 of said money was paid to the creditors of the said Henningsen and Clive named in the schedule attached to the said written stipulation, in the amounts specified in said schedule; and the balance of said money, to wit, $5,041.79 was paid to the defendant The National Bank of Commerce, in trust for all of the parties hereto, to await and be subject to the final decree to be rendered herein; and the
58 said money, to wit, the sum of $5,041.79 is still retained and held by the said defendant in trust as aforesaid.

X.

The complainant further alleges that it is informed and believes, and upon its information and belief alleges, that the defendants and each of them claim and will claim and allege that the assignment hereinabove complained of, from the defendant Henningsen to the defendant National Bank of Commerce, or the defendant R. R. Spencer, was made for the purpose of securing the payment of a loan of loans made by the said defendant bank to the said Henningsen, and that the money or moneys loaned by the said bank to the said Henningsen were loaned to the said Henningsen to enable him to carry on and complete the contract above referred to, and that the whole of the money or moneys so loaned was expended by the said Henningsen for and was necessary to the performance of such contract, and that the same was actually and necessarily used in the payment of labor and material in the performance of said contract, and that if said money or moneys had not been loaned by the said bank to the said Henningsen he would have been unable to complete the

performance of the said contract. And the complainant denies that the said assignment from the said defendant Henningsen to the defendant bank was made for the purpose of securing the payment of a loan or loans of money to be used or which was used to enable the said Henningsen to carry on and complete the said contract; but upon its information and belief alleges the fact to be that
59 the said assignment was made to secure, in large part at least, the payment of loans made by the said bank to the said Henningsen before the execution of the contract hereinbefore referred to; and the complainant denies that the whole of the moneys loaned by the defendant bank to the defendant Henningsen was expended by the defendant Henningsen for the performance of the said contract, and denies that the same was used in the payment of labor or material in the performance of said contract and upon its information and belief alleges the fact to be that the said moneys were, in large part, expended in the payment of the indebtedness of the said Henningsen existing prior to the execution of said contract, and in the payment of the living expenses of the said Henningsen, and in the payment of indebtedness in no wise connected with the performance of said contract; and the complainant denies that any loan or loans made by the defendant bank to the defendant Henningsen in anywise enabled the said Henningsen to complete the performance of said contract.

XI.

The complainant further alleges that since the commencement of this suit the complainant has commenced in this court a suit in equity, being suit number 1205 of this court, in which it is the complainant and in which all of the persons, firms and corporations having claims against the defendant Henningsen or the defendants Henningsen and Clive, the contractors for the erection and
60 construction of the building hereinabove mentioned, and entitled to demand payment from or maintain actions against the complainant upon the bond hereinabove specified, on account of the default of the said contractors, are the defendants. That by reason of the diverse citizenship of the complainant- and each and all of the said defendants, and by reason of the fact that the amount involved in said suit exceeds the sum of $2,000.00, this Court has full and complete jurisdiction of said suit for all purposes. That such proceedings have been had in said suits that all of the said defendants have appeared therein, and the said suit is proceeding regularly to final decree. That in its bill of complaint in said suit, the complainant has admitted its liability to the said defendants, on account of said bond and said default, in the just and full sum of the penalty of said bond, to wit, the sum of $11,625.00 and all proper and lawful costs and expenses; and the complainant has, in its said bill of complaint, tendered itself as ready and willing to pay into the registry of this court the full amount of the penalty of the said bond and all proper and lawful costs and expenses, for distribution amongst the said defendants as their rights shall be established in said suit. That after the payment to the

creditors of the said contractors of the sum of $8,024.21, as hereinabove stated, there remained due and is now due to the creditors of the said contractors, who are entitled to share in the penalty of the said bond, more than $13,000.00, and by reason thereof, and by reason of the further fact that the amount due some of the said creditors is in dispute, and by reason of the further fact that
61 the right of some of the said creditors to share in the penalty of the said bond is in dispute, and by reason of the further fact that suits have been commenced by some of said creditors against the complainant on their demands, it is necessary that the amounts due to each of said creditors and the proportion of the said penalty of said bond which each of said creditors is entitled to receive should be ascertained and determined in said suit before the complainant can safely discharge its obligation under said bond.

Wherefore, the complainant prays, 1st, that the Court will, by its decree herein, declare that the assignment above mentioned to the defendant, The National Bank of Commerce, or the defendant, R. R. Spencer, is null and void against this complainant, and will by its decree declare that the complainant is entitled to receive from the defendant, The National Bank of Commerce the said sum of $5,041.79, held by it in trust as hereinabove alleged, and will decree payment of the said sum of money by the said defendant to the complainant; and that the complainant recover of and from the defendants herein its costs and disbursements herein to be taxed, and have such other and general relief as in justice and equity it is entitled to receive.

2d. That the defendants and each of them be required to answer this amended and supplemental bill of complaint, but not under oath, an answer under oath being expressly waived.

CARR & PRESTON,
*Solicitors for Complainant.*

62 STATE OF WASHINGTON, *County of King, ss:*

E. M. Carr, being first duly sworn, on oath, deposes and says:

I am one of the solicitors for the complainant, and make this affidavit in behalf of the complainant because the complainant is a foreign corporation; I have read the above and foregoing amended and supplemental complaint, know the contents thereof, and believe the same to be true.

E. M. CARR.

Subscribed and sworn to before me this 14th day of January, A. D. 1905.

[NOTARIAL SEAL.] W. M. WILLIAMS,
*Notary Public in and for the State of Washington,*
*Residing at the City of Seattle, Wash.*

EXHIBIT "A."

*Construction Blank.*

This agreement entered into this twelfth day of May, nineteen hundred and three, between G. S. Bingham, Major and Quartermaster, United States Army, of the first part, and R. M. Henningsen and Edward W. Clive, copartners doing business under the firm name and style of R. M. Henningsen & Co. of Seattle, in the county of King, State of Washington, of the second part, witnesseth, that the said G. S. Bingham, Major and Quartermaster, U. S. Army,
63 for and in behalf of the United States of America, and the said R. H. Henningsen and Edward W. Clive, copartners as aforesaid, do covenant and agree, to and with each other, as follows:

Article 1. That the said parties of the second part shall furnish all the material and labor required and shall construct, complete, at Fort Lawton, Washington, according to the plans and specifications therefor hereto atached and made a part of this agreement, the following named buildings, for which they shall be paid as follows, to wit:

Field Officers' Quarters:

| | |
|---|---|
| For Construction, Proper | $9,230.07 |
| For Plumbing | 770.00 |
| For Steam Heating | 1,018.00 |
| For Gas Piping | 300.00 |
| Total | $11,318.07 |

Captains' Quarters:

| | |
|---|---|
| For Construction, Proper | $12,959.69 |
| For Plumbing | 1,350.00 |
| For Steam Heating | 1,552.00 |
| For Gas Piping | 400.00 |
| Total | $16,261.69 |

Lieutenants' Quarters:

| | |
|---|---|
| For Construction, Proper | $10,882.19 |
| For Plumbing | 1,020.00 |
| For Steam Heating | 1,220.00 |
| For Gas Piping | 325.00 |
| Total | $13,447.19 |

64 Non-commissioned Officers' Quarters:

| | |
|---|---|
| For Construction, Proper | $4,798.05 |
| For Plumbing | 475.00 |
| For Gas Piping | 200.00 |
| | $5,473.05 |
| Grand total sum of | $46,500.00 |

Article 2. That work on this contract shall commence on or before the twelfth day of May, nineteen hundred and three, shall be carried forward with reasonable dispatch, and be completed on or before the twelfth day of January, nineteen hundred and four.

Article 3. That for and in consideration of the faithful performance of the stipulations of this agreement the parties of the second part shall be paid, at the office of the Constructing Quartermaster, U. S. Army, at Seattle, Washington, as stated in article 1 of this agreement—the total sum of forty-six thousand, five hundred dollars ($46,500.00).

Payments to be made at such times and in such amounts as the officer in charge of the work may elect, based upon estimates to be made by him of completed work; and in all payments twenty (20) per centum of each to be retained until the final completion and acceptance by the Government of the work under contract.

Article 4. That in case of failure of the said parties of the second part to comply with the stipulations of this contract, according
65 to the true intent and meaning thereof, then the party of the first part shall have the power to complete the work at the expense of the parties of the second part in such manner as the party of the first part shall deem best for the interests of the public service, either by day's labor and open market purchase of the necessary material, or by contract, or both and any excess of cost resulting from such failure shall be charged to the parties of the second part.

Article 5. That neither this contract nor any interest therein shall be transferred by the said R. M. Henningsen and Edward W. Clive, copartners as aforesaid to any other party or parties, and any such transfer shall cause the annulment of the contract so far as the United States is concerned; all rights of action, however, for any breach of this contract by the said R. M. Henningsen and Edward W. Clive, copartners as aforesaid—are reserved to the United States.

Article 6. That no member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

Article 7. That this contract shall be subject to the approval of the Quartermaster General U. S. Army.

In witness whereof, the undersigned have hereunto placed their hands, the date first hereinbefore written.

Witnesses:

FRANK W. GOODHUE, As to
G. S. BINGHAM,
*Major and Quartermaster, U. S. Army.*

EDWARD G. WORTH, As to
66 R. M. HENNINGSEN,

FRANK M. HAWKES, As to
EDWARD W. CLIVE,
*Copartners Doing Business Under the Firm Name and Style of R. M. Henningsen & Co.*

(Executed in Quintuplicate.)

EXHIBIT "B."

*Contractor's Bond (Public Works).*

Know all men by these presents, that we, R. M. Henningsen and Edward W. Clive, copartners doing business under the firm name and style of R. M. Henningsen & Co. of Seattle, Washington, as principals, and The United States Fidelity and Guaranty Co., a corporation, existing under the laws of the State of Maryland, as surety, are held and bound unto the United States of America in the penal sum of eleven thousand six hundred and twenty-five ($11,625.00) dollars, to the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above bounded R. M. Henningsen and Edward W. Clive, copartners as aforesaid, have, on the twelfth day of May, 1903, entered into a contract with the United States, represented by G. S. Bingham, Major and Quartermaster, U. S. Army, at Seattle, Washington, for the construction, complete, at Fort Lawton, Washington, of four (4) certain buildings.

67 Now, therefore, if the above-bounden R. M. Henningsen and Edward W. Clive, copartners as aforesaid, their heirs, executors, administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract, agreed and covenanted by said R. M. Henningsen and Edward W. Clive, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying labor or materials in the possession of the work provided for in said contract, then the above obligation shall be void, and of no effect; otherwise to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instrument this 15th day of May, 1903; the name and corporate seal of said surety being hereto affixed and these presents duly signed by its attorney in fact pursuant to a resolution of its board of directors, passed on the 11th day of April, 1898, a copy of the record of which is on file in the War Department.

In presence of:

EDWARD G. WOOLT, (As to)
R. M. HENNINGSEN. [SEAL.]

HENRY C. EWING, (As to)
EDWARD W. CLIVE. [SEAL.]

68 Attest:

NORMAN LEWTON, } (As to Surety),
KARL LIVELY }

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By J. L. HARTMAN, *Its Attorney in Fact.*

[Corporate Seal of U. S. F. & G. Co.]

EXHIBIT "C."

This agreement made and entered into this 17th day of June, 1904, between R. M. Henningsen and Edward W. Clive, the parties of the first part, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, the parties of the second part, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, the party of the third part.

Witnesseth: That whereas the parties of the first part heretofore, as copartners, entered into a contract with the Government of the United States for the erection of certain buildings at Fort Lawton in King County, State of Washington; and whereas the party of the third part claims that the parties of the first part as principals, and the party of the third part as Surety, made and delivered to the United States of America, a certain bond conditioned, among other things, for the performance of said contract and the payment of persons supplying labor and materials in the prosecution of the work provided for in said contract; and

69 Whereas, the said work provided for in said contract has been completed and the Government of the United States, through its representatives, is ready to pay to the parties of the first part the balance due on said contract, to wit, the sum of thirteen thousand and sixty-six dollars; and any payments hereafter made on said contract;

And whereas the parties of the second part claim that said money should be paid and the check for the same should be endorsed and delivered to the said R. R. Spencer for the purpose, in so far as may be necessary, of paying certain indebtedness, amounting to the sum of forty-eight hundred seventy dollars, with interest thereon, owing to The National Bank of Commerce of Seattle; and

Whereas, the party of the third part claims that it is entitled that said money should be paid and said check endorsed to it on account of certain rights arising from said bond, and in particular through its alleged right to be subrogated to the rights of the United States, and certain persons on account of certain claims alleged to be unpaid for work and material furnished in the performance of said contract, or claim that it is entitled that said money should be paid and said check endorsed to it on behalf of -ther persons making such claims; and

Whereas, the party of the third part has filed a bill in equity in the United States Circuit Court for the District of Washington, Northern Division, against the parties of the first part and the parties

70 of the second part, seeking to have the claim of the party of the third part as aforesaid established, and has secured a certain emergency order therein against the parties of the first and second parts;

Now, therefore, the parties hereto have agreed and do hereby agree as follows, to wit:

That said sum of thirteen thousand sixty six dollars and any payments hereafter made on said contract be paid and said check endorsed and delivered to the said R. R. Spencer, and that said sum

of money be distributed as follows, to wit: That the sum of five thousand and forty-one 79/100 dollars be applied in conditional payment and satisfaction of three certain notes made and delivered by R. M. Henningsen to The National Bank of Commerce of Seattle, and being dated and in the amounts respectively as follows:

One note for thirty-five hundred dollars, dated October 10, 1903, bearing interest from its date at the rate of eight per cent per annum;

One note for one thousand dollars, dated April 2, 1904, and bearing interest from its date at the rate of eight per cent per annum;

One note for three hundred seventy dollars, dated May 14, 1904, and bearing interest from its date at the rate of eight per cent per annum;

That the balance of said money, to wit, the sum of eight thousand twenty-four and 21/100 dollars, and such further amounts as may be paid on said contract to said Spencer be paid to persons having claims for labor and material performed upon and furnished in the performance of said contract, such payments to be made
71 to them in the amounts specified in the schedule hereto annexed marked Exhibit "A," and made a part hereof.

That in case it be finally determined by appropriate litigation that the party of the third part was entitled to receive the money so hereinbefore provided to be paid upon the claim of The National Bank of Commerce of Seattle, or to have said amount devoted to the payment of claims for labor and material upon said contract, then said, The National Bank of Commerce of Seattle is to pay said sum of money last referred to, by it received, either to the party of the third part, or such other parties as may be determined by the final judgment or decree of the Court, and in such case the conditional payment of the claim of The National Bank of Commerce of Seattle shall be of no further force or effect, but said claim shall exist as a valid and subsisting obligation against the said R. M. Henningsen, notwithstanding such conditional payment, and pending such final determination, said bank shall retain said notes. Such payment of said sum of money and such endorsement of said check to the said R. R. Spencer and such conditional payment of said claim of The National Bank of Commerce of Seattle shall not be construed as a waiver of any claim which the party of the third part might otherwise have upon said fund, either through itself or on account of any subrogation to which it might be entitled as to rights of persons having claims for labor and material performed and furnished for said contract, or to the rights of the United States, but such
72 claim, if any, shall be and continue to the same effect, and with the same rights and remedies and subject to the same conditions and limitations as if these presents had not been executed, and such payment and endorsement had not been made; and the payment of the balance of said money, after the payment of the claims of said bank, to the persons furnishing labor and material, shall not affect nor be construed as affecting any of the rights of the parties of the second part, or either of them to said fund, nor as limiting and diminishing the rights of either of the parties of the

second part thereto, all of which rights shall continue with the same remedies and subject to the same conditions and limitations as if these presents had not been executed, and said payment and endorsement had not been made, it being the intention of these presents to provide a temporary method for the disposition of said fund, leaving the rights of all parties hereto, and the rights of such creditors with regard to the same *in statu quo*, including the rights of the parties of the first part in so far as the parties of the second part may claim thereunder, and with such force and effect as that the rights of the parties of the second part and of the third part shall continue as if said fund was still in the hands of the representatives of the Government of the United States to be paid as the rights of the parties might require in case these presents had not been executed nor acted upon;

That the party of the third part may prosecute the said
73 action brought by it in the Circuit Court of the District of Washington, or such further action as it may bring in said court, all the parties herto conceding and agreeing to hereafter concede that said Circuit Court has the same jurisdiction of said action as if the same had been brought by the party of the third part in the United States Court of Claims, and agreeing to raise no objection to such jurisdiction of said Court to render a decree in said action upon the merits, provided that this stipulation shall not prevent the parties of the second part or third part herein, or any of them, from raising the question that neither the Court of Claims nor any other court has the right or the jurisdiction to grant the relief asked by the party of the third part, or any relief whatsoever.

It is further agreed that the foregoing stipulation as to the jurisdiction of the Circuit Court shall not prevent any of the parties thereto from appealing or applying for a writ of certiorari or asserting any other appellate right to the same extent as might be done in any other case brought in said Circuit Court, save and except that no objection to the jurisdiction of said court shall be raised either upon appeal, or in any other manner, which could not be raised if said action had been brought by the party of the third part in the Court of Claims, should it appear that said action should have been brought in said Court of Claims.

It is further agreed that no objection shall be made to said suit
in the Circuit Court upon the ground of the United States not
74 being a party, but this stipulation shall not be construed as debarring the parties of the first or second part from raising the question that the party of the third part could not in any case maintain this suit for the reason that the United States could not, either in the Circuit Court or the Court of Claims, be made a party and its disposition of the fund could not in any manner be controlled by any court, and if the pending action above referred to prove for any reason or cause not to be proper or appropriate action or proceeding to determine the question in dispute, *i. e.*, whether said fund should go to the second parties or either of them in satisfaction of said notes, or should be applied to the payment of labor and material claims accrued on said Government contract, then said dispute

may be determined in some other action or proceeding appropriate to the determination thereof, and the right or claim of the second parties to retain said money absolutely, shall be in abeyance until said dispute is finally determined on the merits, or until it has been determined that neither the said Circuit Court nor Court of Claims, nor any court of the State of Washington has jurisdiction of the matter.

It is further agreed that if it be determined that said Circuit Court has no jurisdiction of such action for the reason that the same should have been brought in the Court Claims, this stipulation shall not prevent the party of the third part from instituting another action.

In witness whereof the parties hereto have hereunto set
75 their hands and seals the day and year first above written.

R. M. HENNINGSEN & CO.,
By R. M. HENNINGSEN.
NATIONAL BANK OF COMMERCE, SEATTLE, WASH.,
By R. R. SPENCER, *Cashier.*
R. R. SPENCER.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By CARR & PRESTON, *Its Att'ys.*

SCHEDULE.

List of persons and corporations making claim on account of labor and material furnished for the contract of R. M. Henningsen and Company with the United States Government for work at Fort Lawton.

| Name. | Amount to be Paid. |
|---|---|
| Bryant Lumber and Shingle Mill Co | $2,234.00 |
| S. E. Brown & Co | 927.69 |
| W. O. Nelson | 445.71 |
| James B. Clow and Sons | 618.84 |
| W. H. Hunter | 222.39 |
| E. C. McDougall & Co | 884.59 |
| C. B. Smith Co., Inc | 970.29 |
| F. T. Crowe & Co | 107.69 |
| Pacific Clipper Line | 58.34 |
| Denny Clay Co | 60.34 |
| 76 Schwabacher Hardware Co | 104.69 |
| Seattle Iron Works | 47.97 |
| The A. Hambach Co | 7.45 |
| Z. C. Miles & Piper Co | 34.09 |
| Westerman Iron Works | 75.35 |
| Frederick & Nelson, Inc | 43.91 |
| Carstens Bros | 46.08 |
| Seattle Market | 65.52 |

| | |
|---|---|
| Chicago Grocery | 16.01 |
| Chesley Tow-boat Co., Inc | 93.33 |
| Seattle Window Cleaning Co | 16.40 |
| Z. C. Miles & Piper Co | 168.00 |
| W. E. Porter, assignee of, or holding orders for payment of labor claims | 765.00 |
| | $8,013.68 |
| The payment of which sum and of | 5,041.79 |
| To the National Bank of Commerce of Seattle, as per contract, will leave a balance on hand for future distribution of | 10.53 |
| | $13,066.00 |

(EXHIBIT "A.")

Received copy of the within complaint and service of the same admitted this 14th day of Jan., 1905.

G. E. DE STEIGUER,
*For Def'ts.*

[Endorsed:] Amended and Supplemental Complaint. Filed this 14th day of January, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

77 [Title of Court and Cause.]

*Joint and Several Answer*

Of the Defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a Corporation, and R. R. Spencer, to the Amended and Supplemental Complaint of the Complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland.

These defendants respectively now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties or imperfections in said amended and supplemental complaint contained, for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer thereto, answering, say:

1. These defendants admit that the defendants, R. M. Henningsen and Edward W. Clive, at the time of the making of the contract with the United States Government referred to in the amended and supplemental complaint, became and were joint contractors for the performance of said contract, but deny that they were such copartners or continued to act as such joint contractors at the time of the making of the notes, loans or assignments hereinafter referred to, and aver that before the making of such notes,

loans and assignments the said Edward W. Clive had withdrawn from all participation in the performance of said contract,
78 and had agreed with the defendant Henningsen that said defendant Henningsen should thereafter perform the same under his sole supervision and direction, and receive all checks and moneys thereafter due, or to become due from the United States on account of said contract, and the matters relating thereto, and admit that the said R. M. Henningsen and Edward W. Clive at all times in the amended and supplemental complaint alleged were and still are citizens and residents of the State of Washington.

2. These defendants further admit that at the times alleged in the amended and supplemental complaint, the complainant was a corporation doing business under and by virtue of the laws of the State of Maryland, and was and now is a citizen of the State of Maryland, and that the defendant, The National Bank of Commerce of Seattle, Washington, during the said times was and still is a corporation, organized and existing under and by virtue of the laws of the United States, and doing business at a national bank in the State of Washington, and was and now is a citizen and resident of the State of Washington, and that the defendant, R. R. Spencer, during said times was and is the duly elected, qualified and acting cashier of said bank and as such, its chief managing officer, though not entitled as manager, and was and is during said time, a citizen and resident of the State of Washington.

3. Referring to paragraph three of the complaint, these defendants admit that on or about the 12th day of May, 1902, the
79 defendants Henningsen and Clive entered into a contract with the United States for the construction at Fort Lawton, Washington, of four certain buildings described in said contract, of which a copy is attached to said amended and supplemental complaint, and that the said Henningsen and Clive, together with the complainant, did make, execute and deliver to the United States a certain bond, a copy of which is attached to said amended and supplemental complaint, marked Exhibit "B," but deny that said bond was made, executed or delivered upon the considerations set forth in paragraph three of the supplemental and amended complaint, or any thereof, and allege that the considerations upon which said bond was made and delivered upon the part of the complainant was a certain sum or premium then and there paid by the said Henningsen and Clive to the complainant.

4. Referring to paragraph four of the amended and supplemental complaint, these defendants admit that there were at the time of the filing of the complaint herein, various amounts due on account of labor and material employed and furnished in the performance of said contract, amounting in all to about twenty thousand dollars; and admit that a large amount thereof is still unpaid, but as to what said unpaid portion is, these defendants deny any information or knowledge sufficient to form a belief, and deny that the said contract provided for the payment of the persons supplying and furnishing such labor and material, or any of them, of the amounts

of their labor and material, or any thereof, and allege that
80 said contract contains no provision whatsoever for the payment of laborers furnishing labor, or persons furnishing material in the performance of said contract.

5. Referring to paragraph five of the amended and supplemental complaint, these defendants admit that said contract provided for the retention of twenty per cent, of the contract price as therein stated, and admit that at the time this action was commenced there was in the hands of the officials of the United States to be paid upon said contract price, and including said twenty per cent. in all, the sum of about thirteen thousand and sixty-six dollars ($13,066.00), and deny that any more of said contract price remained unpaid, or was in the hands of the United States at said time, or at any time since, and deny that the same, or any thereof, was or is justly applicable, or applicable at all (to the payment of the obligations incurred by said contractors in the performance of said contract, or any of them.

6. And further, by way of answer to the amended and supplemental complaint, and in particular to paragraph six thereof, the respondents say: That heretofore before the 10th day of October, 1903, the said Edward W. Clive had disposed of all his interests in the contract referred to in the petition to his partner the said R. M. Henningsen, and that the said Clive thereafter took no part in the performance of said contract, or in the furnishing of labor or material therefor, and the said Henningsen had the sole supervision and direction, including the furnishing of all money, labor and material incident to the performance of said contract;
81 that on the 10th day of October, 1903, the said Henningsen for the purpose of enabling him to perform the contract referred to in the petition, and of enabling him to secure and pay for labor and materials necessary to said performance, borrowed of the defendant, The National Bank of Commerce of Seattle, the sum of thirty-five hundred dollars, giving to said bank his promissory note, payable on demand, for the amount of said loan, with interest thereon at the rate of eight per cent. per annum until paid, on which note no payments whatsoever have been made; that at the time of borrowing said money, the said R. M. Henningsen informed and promised said bank, one of the defendants herein, and informed said R. R. Spencer, its cashier, and the one who attended to the making of said loan, that he desired said loan for the purpose of enabling him to perform his said contract, and that upon the issuance of his checks, drafts, or pay-orders on said contract, he would cause the same to be delivered to the said Spencer for and on behalf of said bank, and would cause the money realized therefrom to be paid to the said bank in so far as might be necessary for the purpose of repaying said loan, and that said money was so loaned to the said R. M. Henningsen for the purpose of enabling him to complete his said contract, and that the whole thereof was by him expended for, and was necessary to the performance of such contract, and that the said bank loaned said money on the faith and credit of the representations and promises of the said

Henningsen as to the repayment of such loan from payments
82 to be made upon said contract, and upon all his representations and promises hereinbefore set forth.

That thereafter, on or about the 16th day of March, 1904, and for the purpose of confirming his representations and promises hereinbefore set forth, and for the purpose of securing the repayment to said bank of such further sums of money as might be loaned to the said R. M. Henningsen, for the purpose of carrying out his contracts for supplying labor and materials, said Henningsen made and delivered to the said R. R. Spencer, in trust for and for the use of said bank, an assignment of all payments then due, or which might become thereafter due on account of his said contract referred to in the said complaint, and further made and delivered to the said Spencer in trust for and for the use of said bank, an order addressed to Captain F. A. Grant, United States Quartermaster at Seattle, Washington, requesting him to deliver checks for any and all balances due on account of said contract to the said R. R. Spencer, which said assignment and which said request were both signed by the said R. M. Henningsen, for and as the act of himself, the said R. M. Henningsen, and the said Edward W. Clive, and signed by the said firm of R. M. Henningsen & Co., which said request was on the 18th day of March, 1904, delivered to the said Captain F. A. Grant, United States Quartermaster at Seattle, Washington, together with a letter from said R. R. Spencer, referring thereto and stating that the same was inclosed, which said request of the said R. M. Henningsen & Co., and letter of said Spencer are now
83 on file in the office of the said Quartermaster, and of which, as these respondents believe, due notice has been given to the War Deparment at Washington, D. C.

That thereafter, on the 2d day of April, 1904, on the faith and credit of said assignment and request hereinbefore set forth, and for the purpose of enabling the said R. M. Henningsen to pay for labor and material to be furnished on said contract, said bank further loaned to said R. M. Henningsen the sum of one thousand dollars, taking his note therefor, with interest thereon at eight per cent. per annum from April 2, 1904, payable on demand, on which note no payments whatsoever have been made; that at the time of securing said loan, the said R. M. Henningsen, represented to said bank and to said R. R. Spencer, as its cashier, that said money was furnished for the purpose of paying for materials and labor in the performance of said contract, and promised and agreed with said bank that said loan should be repaid from the balance due or to become due to him upon said contract, and said bank made said loan upon the faith and credit of the assignment, request and promise and agreement of the said R. M. Henningsen hereinbefore set forth, and said money so loaned was all actually and necessarily used in the payment of labor and material in the performance of said contract.

That thereafter, upon the 14th day of May, 1904, said bank, upon the faith and credit of said assignment and request, further loaned to the said R. M. Henningsen the sum of three hundred
84 seventy dollars, taking his note for said sum, with interest from May 14th, 1904, at the rate of eight per cent. per annum,

upon which note no payments whatsoever have been made, and which said note was payable on demand, and that said money was so loaned upon the faith and credit and in reliance upon the assignment and request of the said Henningsen hereinbefore referred to, and upon the further statement of the said Henningsen made by him at the time of securing said loan, that said money was secured for and would be used in the payment of labor and material for the performance of said contract, upon all of which said representations said bank relied in the making of said loan, and these defendants further say that said money was actually necessary, and was actually and necessarily used for the payment of labor and material used in the performance of said contract.

These defendants further say that said bank has no other security whatsoever for the repayment of said loan, and that the whole thereof is justly due, owing and unpaid as evidenced by the said notes, all signed by the said R. M. Henningsen, and that all the money advanced upon said loan was necessarily secured by the said Henningsen in order to enable him to complete said contract, and that without the same said contract could not have been completed.

These defendants further say, that if said sums of money hereinbefore referred to had not been loaned to the said R. M. Henningsen, he would have been unable to complete the performance of his contract, and that either the same would have been left only
85 partially performed, to the great loss and damage of the United States, or it would have been necessary for the complainant herein to have completed the contract to its own great loss and damage, and that the complainant and the Government of the United States has fully received thereby the benefit of all said loans hereinbefore set out and made by said bank to said R. M. Henningsen; and these defendants further deny that the assignments and orders hereinbefore referred to were contrary to the statutes of the United States or said contract, and deny that the debt thereby secured has no conection with the business of the said contract hereinbefore referred to, and deny that the same is of long standing, and to the contrary allege that the same is as hereinbefore set forth.

7. Referring to paragraph seven of the amended and supplemental complaint, these defendants admit that at the time therein referred to, the defendant Clive was taking no part in the performance of said contract, or in the transaction of business relating thereto, and that the defendant Henningsen had the sole supervision and direction of the matters pertaining thereto, including the receipt of all checks and money due from the United States on account of said contract, or any matters relating thereto. And these defendants allege that prior to the 10th day of October, 1903, the copartnership between the said Henningsen and said Clive had been dissolved and that the said Henningsen alone proceeded in the performance of said contract, and had, alone, the right, separate and apart from the said
86 Clive, to receive the contract price, and that at the time of the making of the complaint herein, the said Henningsen was alone to receive the payment of said purchase price, and that it had been agreed by the said Henningsen, that immediately upon the

receipt from the quartermaster of the balance due upon said contract, to wit, the sum of about thirteen thousand dollars, the same was to be paid to the said Spencer, in so far as necessary to pay the indebtedness owing to said bank as hereinbefore set forth, and that it had been agreed that any check made or issued upon such payment should be at once endorsed and delivered to the said Spencer, and admit that the same, in so far as necessary, was about to be applied upon the indebtedness of the said Henningsen to said bank hereinbefore set forth; but deny that the balance of said money so to be paid upon said contract, beyond what was necessary to the payment of the indebtedness owing to said bank as hereinbefore set forth, was to be diverted from or lost to the creditors who had furnished labor and materials in the performance of said contract, or to the complainant herein, but aver to the contrary that the balance of said money beyond what was necessary to pay the indebtedness owing to said bank was to be applied in the payment of such claims for labor and materials.

8. Referring to paragraph eight of said amended and supplemental complaint, these defendants admit the same.

9. Referring to paragraph nine of said amended and supplemental complaint, these defendants admit that of the money
87 referred to in said contract or stipulation in writing, a copy of which is attached to said amended and supplemental complaint, marked Exhibit "C," $5,041.79 was paid to The National Bank of Commerce of Seattle, and the balance, $8,024.21 was paid to the creditors named in the schedule attached to said stipulation, and in the amounts therein specified, but deny that the payment to said bank was made, or is retained or held in trust for all of the parties hereto, or any thereof, save and except in so far as the same is subject to said written stipulation, and aver that of said contract price for said buildings the sum of $13,066.00 was paid, and the check therefor endorsed and delivered to the defendant, R. R. Spencer, and of said amount, the sum of $5,041.79 was paid to said bank in conditional payment and satisfaction of the notes referred to in said stipulation, and the sum of $8,024.21 was paid to the creditors named in said schedule, and in the amounts therein specified.

10. Referring to paragraph ten of said amended and supplemental complaint, these defendants say that they have already answered the same hereinbefore in this answer.

11. Referring to paragraph eleven of said amended and supplemental complaint, these defendants deny any knowledge or information sufficient to form a belief, save and except that these defendants admit that the complainant has instituted an action against some or all of the persons having or claiming to have claims
88 as therein set forth for the purposes in said paragraph alleged.

Wherefore, these defendants pray that this suit be dismissed, and that these defendants go hence with their costs most wrongfully sustained, and for such other relief and protection of their rights as may be equitable and according to good conscience.

G. E. DE STEIGUER,
*Solicitor for the Defendants.*

Service of the within answer by delivery of a copy to the undersigned is hereby acknowledged this 26 day of January, 1905.

CARR & PRESTON,
*Attorneys for Pl'ff.*

[Endorsed:] Answer to Amended and Supplemental Complaint. Filed in the United States Circuit Court, District of Washington. Jan. 27, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

*Replication.*

This replicant, United States Fidelity and Guaranty Company of Baltimore, Maryland, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the joint and several answer of the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, to the amended and supplemental complaint of the complainant, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and each of them, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

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CARR & PRESTON,
*Solicitors for Complainant.*

Received copy of the within replication to answer and service of the same admitted this 31st day of Jan'y, 1905.

G. E. DE STEIGUER,
*Attorney for Defendants.*

[Endorsed:] Replication to Answer. Filed this 31st day of January, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

90 [Title of Court and Cause.]

*Deposition of R. R. Spencer.*

Deposition on behalf of the defendants taken before me, the undersigned, Eben Smith, United States Master in Chancery, for the District of Washington, in the above-entitled cause, as follows:

On this 2d day of February, A. D. 1905, before me, Eben Smith,

United States Master in Chancery, for the District of Washington, personally appeared General Carr, of Carr & Preston, solicitors for the complainant, and G. E. de Steiguer, solicitor for the defendants, and at the hour of 2 o'clock P. M., by consent, R. R. Spencer, a witness on behalf of said defendants, who appeared by their solicitor, was produced, and by me carefully cautioned and duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to the matters in controversy in such cause, and being by George E. de Steiguer orally examined, testified as follows:

Examination in Chief:

Q. State your name, residence and occupation?

A. R. R. Spencer; Hotel Washington, Seattle; Banker.

Q. What is your connection with the defendant, the National Bank of Commerce of Seattle?

A. I am cashier and manager.

Q. Were you such cashier throughout the period of the transactions of the subject matter of this action?

A. I was.

91 *(Deposition of R. R. Spencer.)*

Q. I show you Defendants' Exhibit "A." Who signed the name "R. M. Henningsen" to that paper?

A. Mr. R. M. Henningsen.

Q. The defendant in this action?

A. Yes, sir.

Q. To whom was that made and delivered?

A. To the National Bank of Commerce or to me as manager of the National Bank of Commerce.

Q. Is the bank still the holder and owner of that paper?

A. It is.

Q. Has anything been paid upon it?

A. Nothing.

Q. I will call your attention to the erased credit upon the back of the note in the words following: "Int. paid to Dec. 31st, 1903," and ask you how that came to be made, and how it came to be erased.

A. It is customary for us to collect, on demand notes, interest for the elapsed period on June 30th and December 31st; at the close of the fiscal half years. Where the interest is not actually paid in, a credit slip to interest account is made, and, ordinarily, a pencil endorsement is made on the note to show that such slip is in the cash. I had previously attended to this matter, but at the time this endorsement was made delegated it to W. H. Wright, and he made an endorsement in ink, just as though the amount had actually been paid. I think, in this instance, Mr. Henningsen came in and gave his note for the interest, which note was never paid, and the sum, purporting to have been received under this endorsement, was never received by the bank in cash.

92 Q. What, if anything, was the consideration for that note?

A. Thirty-five hundred dollars in cash.

Q. I will now show you Defendants' Exhibit "B," and ask you to explain, in the same way, the existence and ownership of that note.

A. It was executed and delivered by R. M. Henningsen to me as manager of The National Bank of Commerce for the sum of one thousand dollars which was cash advanced to him.

Q. Have any payments ever been made upon that note?

A. No.

Q. Does the bank still own it?

A. It does.

Q. I now show you Defendants' Exhibit "C," and ask you who made and delivered that note, to whom and for what?

A. This note was executed and delivered by R. M. Henningsen in person for the sum of three hundred and seventy dollars cash advanced.

Q. Who is the owner of the note now and holder of it?

A. The National Bank of Commerce.

Q. Have there ever been any payments made on that note?

A. None whatever.

Q. At the time you made Mr. Henningsen the first advance, being that for thirty-five hundred dollars, was there any arrangement between you and him as to the securing of payment of that note?

A. There was.

Q. What was that agreement?

93 A. He agreed he would assign and turn over to us the payments received on this contract.

Q. Did Mr. Henningsen make any statement to you as to the purpose for which he wished this money?

Mr. CARR: Objected to as irrelevant and immaterial.

A. Yes; he stated at the time that he was being hampered on his Fort Lawton contract by the fact that the inspector was giving him short estimates and that he would have to have money to carry the contract through; he also stated that there were some little items of debt on the Mary Island contract, the owners of which were bothering him and that he wished to get this money for the purpose of meeting his pay-rolls and making payment on material on the Fort Lawton contract and to liquidate the items mentioned above in the Mary Island contract.

Q. Did he make any explanation to you as to whether the items of debt on the Mary Island contract had anything to do with the prosecution of his work on the Fort Lawton contract?

Mr. CARR: Objected to as irrelevant and immaterial.

A. He said that they were threatening to sue him and that he was afraid it would absolutely prevent him from going ahead with his work, fearing others to whom he was owing money on the Fort Lawton contract would do the same thing.

94 Q. Did he make any statement as to the respective amounts which he expected to use on the different contracts?

Mr. CARR: Objected to as irrelevant and immaterial.

A. He did not.

Q. I now show you Defendants' Exhibit "D" and ask you by whom it was made, to whom it was delivered and for what?

A. It is an assignment made by R. M. Henningsen and Company executed by R. M. Henningsen and delivered to me to secure the advance made and any advances thereafter made for the prosecution of the work on Fort Lawton.

Q. When you say that was the purpose for which it was given, are you stating in substance what R. M. Henningsen told you at the time of its delivery.

A. I am; or rather it was delivered in pursuance of the demand on my part, or the condition on my part, at the time of making his loans.

Q. Did he hand you any other document at that time?

A. Yes; he gave me a letter addressed to U. S. Quartermaster (I think it was Grant) at that time.

Q. I show you Defendants' Exhibit "E" and ask you what relation that had to that transaction.

A. He gave me a signed letter to the U. S. Quartermaster notifying him practically of the assignment and instructing him to
95 deliver, or requesting him to make a delivery to me of any checks drawn in his favor on the Fort Lawton contract.

Q. Is that a copy of that letter?

A. This is a carbon copy of that letter he signed.

Q. Was it signed, and if so, by whom?

A. It was signed "R. M. Henningsen & Co." by R. M. Henningsen, a member of the firm.

Q. What did you do with this last document you refer to, the notice addressed to Captain Grant?

A. That was sent to him either by mail or messenger; I don't now recollect which.

Q. Did you send any letter with it?

A. I sent a letter substantially as follows:

"MARCH 17, 1904.

SIR: Enclosed I hand you request from R. M. Henningsen & Company to deliver to me any further checks that may be issued by you to account of Fort Lawton contract. I have urged Mr. Henningsen to use every effort to have the work completed by the 28th of this month at the latest, and he is doing everything possible to achieve that end.

Very respectfully yours, R. R. SPENCER, *Cas.*"

Q. At the time that Mr. Henningsen got the thousand dollars advanced—the second note—did he state to you for what he wished that money?

96 Mr. CARR: Objected to as irrelevant and immaterial.

A. He did.

Q. What did he say?

A. It was to be used in making payments to laborers and for material purchased for the Fort Lawton contract entirely.

Q. At the time he got the money on the third note for three hundred and seventy dollars, what, if any, statement did he make to you as to the purpose for which he got this money?

A. It was the same as in my preceding answer, but I think went entirely for pay-roll.

Q. State whether you would have made these loans without the security or the assignment or order and agreement as to repayment to which you have testified?

Mr. CARR: Objected to as irrelevant and immaterial.

A. I would not.

Q. Has the bank any other security for the payment of these notes?

A. We have not. In speaking of these notes not having been paid, of course, I am not referring to the conditional payment which is set out in the agreement attached to the amended bill of complaint.

Q. Do you know of your own knowledge what was done with this money or any of it?

A. No; I have no personal knowledge as to how the money was used.

97 Q. Was any of this money applied in payment of former obligations of Henningsen to the bank?

A. Not one dollar.

Q. Do you remember collecting from the Quartermaster certain money and distributing it?

A. I received from the Quartermaster a check drawn by his office for about thirteen thousand dollars through Mr. Henningsen after this suit was commenced.

Q. Did the bank retain part of that money or did you retain part of this money for the bank?

Mr. CARR: Objected to because that is a matter which is fully covered by the stipulation which is a part of the amended bill of complaint.

A. We retained approximately five thousand dollars under the terms of a stipulation between the parties interested in the suit above mentioned.

Q. Did you pay out the balance in accordance with that stipulation?

A. I did.

And on cross-examination by General CARR, of solicitors for the complainant, testified as follows:

Q. You had loaned money to Mr. Henningsen and his partners, who were contractors for the erection of the Mary Island lighthouse?

A. Yes; the bank had.

Q. At the time the thirty-five hundred dollars was loaned to Mr. Henningsen on the note of October 10, 1903, Henningsen and his partners in that Mary Island contract had made a loss on

98 that contract, had they not, or at least had not collected enough money to pay or had not paid their obligations?

A. They had not in total.

Q. They were considerably in debt on that contract, were they not?

A. They were to us.

Q. Well, to others also.

A. I do not think so; they might have owed some little balances on it.

Q. Mr. Henningsen told you he was being threatened with suits on that Mary Island contract.

A. I know that, but I did not consider there was a considerable amount aside from what he owed us.

Q. Did you question him as to the amount of the indebtedness on which he was being threatened with suit?

A. I do not think I did; I don't remember that I did.

Q. Now, when the money was loaned to him in October, April and May on these three notes which are in evidence, was the money paid in each instance or any instance to Mr. Henningsen, or was it in all three instances placed to his credit upon open account in your bank?

A. The thirty-five hundred dollar note was passed to his credit on open account in the bank and by him checked out; the thousand dollar item and the three hundred and seventy dollar item I am not sure about, but think the first was passed to his credit and checked out by him, and that the second was paid in cash, that is the three hundred and seventy dollars.

99 Q. Neither yourself nor any other officer or employee of the defendant bank exercised any supervision or control over his disbursement of any of this money loaned on these notes.

A. We did not. Had we not had confidence in Mr. Henningsen we would not have loaned him the money.

Q. You do not know to what persons, firms and corporations he paid this money or for what purpose or purposes he paid it?

A. Not except by hearsay.

And on redirect examination by Mr. DE STEIGUER, solicitor for the defendants, testified as follows:

Q. Did you have any understanding with Henningsen as to what was to be done with the balance of the money which might be paid to you under this assignment after the satisfaction of the claims of the bank secured by it?

A. During the first conversation had with him he stated that there would be certain bills to pay, and that when this fund came into our hands that a list of indebtedness would be furnished, and that he expected to use the balance or would use the balance in payment of these debts.

Q. When you say the balance, you mean the balance after satisfaction of the bank's claims.

A. Yes, sir.

It is stipulated that no objection on the ground that the evidence is not the best evidence shall be interposed except when the objection is taken on the examination, and that the reading and

100 signing of the testimony is waived.

During the progress of said examination the following

papers were offered by said defendants' solicitor, duly proved and offered in evidence, and were by me received and marked exhibits and are herewith returned, to wit: Defendants' Exhibit "A," Defendants' Exhibit "B," Defendants' Exhibit "C," Defendants' Exhibit "D" and Defendants' Exhibit "E."

That said depositions were by me reduced to writing, the writing and signing of same waived; that the foregoing constitutes all of the proofs so taken before me; that the said exhibits referred to are by me duly certified and herewith returned; that the taking of said proofs occupied a portion of one day and the stenographer's fee for the same is $—.

All of which is respectfully certified.

EBEN SMITH,
*As United States Master in Chancery for the District of Washington, Northern Division.*

Dated February 6, A. D. 1905.

[Endorsed]: Return of Proofs Taken on Behalf of Defts. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

101 DEFENDANTS' EXHIBIT "A."

SEATTLE, WASH., *Oct.* 10, 1903. $3,500.

On demand after date without grace I promise to pay to the order of The National Bank of Commerce of Seattle, thirty-five hundred dollars, for value received, with interest from date at the rate of eight per cent. per annum until paid. Principal and interest payable only in U. S. gold coin. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of nonpayment thereof, binds himself thereon as a principal, not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the Court may adjudge reasonable as attorney's fees in such suit.

R. M. HENNINGSEN.

R. R. S.

On back:

16,472 $3500.
R. M. Henningsen.
Demand.
Int. paid to Dec. 31st. 1903.

Def'ts' Exhibit "A." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

102 DEFENDANTS' EXHIBIT "B."

SEATTLE, WASH., *Apr.* 2, 1904. $1000.

On demand after date without grace I promise to pay to the order of The National Bank of Commerce of Seattle, one thousand dollars, for value received, with interest from date at the rate of eight per cent. per annum until paid. Principal and interest payable only in U. S. gold coin. For value received each and every party signing or endorsing this note hereby *waived* present-, demand, protest and notice of nonpayment thereof, binds himself thereon as a principal, and not as a surety, and promises in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the Court may adjudge reasonable as attorney's fees in such suit.

R. M. HENNINGSEN.

R. R. S.

On back:

17104. 1000

R. M. Henningsen.

D.

Defendants' Exhibit "B." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. February 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

103 DEFENDANTS' EXHIBIT "C."

SEATTLE, WASH., *May* 14, 1904. $370.

On demand after date without grace I promise to pay to the order of The National Bank of Commerce of Seattle, three hundred and seventy dollars, for value received, with interest from date at the rate of eight per cent. per annum until paid, principal and interest payable only in U. S. gold coin. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of nonpayment thereof, binds himself thereon as a principal, and not as a surety, and promises in case suit is instituted to collect the same or any portion thereof to pay such additional sums as the Court may adjudge reasonable as attorney's fees in such suit.

R. M. HENNINGSEN.

R. R. S.

On back:

17253. $370.00.

R. M. Henningsen.

Demand.

Def'ts' Exhibit "C." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

104 DEFENDANTS' EXHIBIT "D."

H. C. Henry, President.
R. R. Spencer, Cashier.
O. A. Spencer, Asst. Cashier.

The National Bank of Commerce.

Codes:

A. B, C, and A1.
Lieber's.
Bedford McNeill.
Cable Address: "Commerce."

SEATTLE, WASH., *March* 16, '04.

For value received, I hereby assign to R. R. Spencer all payments now due, or that may hereafter become due me, account of my contract with the Government at Fort Lawton.

R. M. HENNINGSEN & CO.

Def'ts' Exhibit "D." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. February 6, 1905. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

105 DEFENDANTS' EXHIBIT "E."

H. C. Henry, President.
R. R. Spencer, Cashier.
O. A. Spencer, Asst. Cashier.

The National Bank of Commerce.

Codes:

A. B, C, and A1.
Lieber's.
Bedford McNeill.
Cable Address: "Commerce."

SEATTLE, WASH., *March* 16, '04.

Captain F. A. Grant, U. S. Quartermaster, Seattle, Washington.

SIR: You will please deliver checks for any and all balance due me, account of Fort Lawson Contract to R. R. Spencer, and this shall be your authority for so doing.

Very respectfully yours,

——— ———.

(Duplicate.)

Defts. Exhibit "E." Eben Smith, United States Master in Chancery, District of Washington, Northern Division. Filed in the United States Circuit Court, District of Washington. Feb. 6, 1905. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

106 [Title of Court and Cause.]

*Order Submitting Cause.*

Now on this day this cause comes on for final hearing, the Court after hearing argument of respective counsel, takes said matter under advisement.

[Title of Court and Cause.]

*Memorandum Decision on the Merits.*

(Filed February 11th, 1905.)

Without delaying the determination of the several controversies herein to the prejudice of the parties, it will be impossible for me to write a decision. I will therefore merely announce my conclusions.

In the main controversy I hold that the contractor made default in the condition of the bond by failing to pay for materials and labor, and by that default the bonding company became absolutely liable for the full amount of the penalty of the bond. To such liability an equitable right attached to have the balance due from the Government on account of the contract applied to the debts of the contractor secured by the bond. The defaulting contractor could not defeat this equitable right by an assignment of the payments to be made by the Government. The bank as assignee occupied no better position than the assignor to resist the application of the payments in reduction of debts secured by the bond. Therefore it will be decreed

107 that the bank pay into the registry of the court the balance of the money which it received under the stipulation and the taxable costs of the litigation made by its controversy.

By the provisions of the statute under which the bond was given and by the terms of the bond itself the obligation of the bond is to pay for all materials and labor furnished and performed in the prosecution of the work contracted for, and I hold that as the contractor conducting a boarding-house for the benefit of workmen employed, and to facilitate the work, provisions supplied and consumed in the boarding-house during the progress of the work are within the intent of the law deemed materials furnished in the prosecution of the work, and the creditors, having claims for said supplies, are entitled to participate in the distribution of the fund.

The statute authorizes a suit in the name of the United States upon the bond by any person or persons supplying labor or materials for his or their use and benefit. I hold that the law contemplates only one action for the benefit of all unpaid creditors, and it does not authorize each and every creditor to maintain a separate action, and it would be contrary to the spirit and purpose of the law to allow any creditor to gain a preference by being the first to sue. The aggregate amount of the contractor's debts being in excess of the penalty of the bond, it was necessary to bring all the creditors before

the Court for the purpose of marshalling the assets. The creditors having failed to unite in instituting suit, with necessary parties, the bonding company for the protection of their rights, as well as
108 its own, necessarily had to file a bill of interpleader, and upon principles of equity the expense of the proceedings to the extent of the taxable costs should be paid out of the moneys which the bonding company is obligated to pay.

I do not find any ground upon which to make a further deduction to pay reasonable attorney's fees. Upon paying into court the full amount of the penalty of the bond, the bonding company will be entitled to be dismissed, absolved from all liabilities upon the bond in suit, and to be paid out of the fund its taxable costs, including an attorney's docket fee of twenty dollars in each of the two cases.

C. H. HANFORD, *Judge.*

[Endorsed:] Memorandum Decision on the Merits. Filed in the United States Circuit Court, District of Washington. Feb. 11, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

*Order of Reference.*

Upon the joint motion of the complainant and the defendants, it is hereby ordered that this cause be referred to Eben Smith, Esq., Master in Chancery, for the purpose only of taking and reporting to this Court such evidence as the respective parties hereto may offer before him, the time for taking and reporting said testimony
109 being by the consent of all parties herein hereby limited to February 9th, 1905.

Dated Seattle, in the district aforesaid, this 10th day of January, 1905.

C. H. HANFORD, *Judge.*

[Endorsed:] Order of Reference. Filed this 13th day of February, 1905. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

*Findings of Fact and Conclusions of Law.*

This suit having been heretofore referred to Eben Smith, Esquire, Master in Chancery, for the purpose only of taking and reporting to this Court such evidence as should be offered before him by the respective parties hereto, and the taking of such evidence having been closed and reported to this Court, the parties hereto appeared in open court by their respective attorneys on the 7th day of February, 1905, and stipulated in open court that the cause should be now submitted to the Court for final decision upon the original bill of complaint and answer thereto, and upon the amended and supplemental bill of complaint and answer thereto, and the replication to said answer on

file herein; and upon the said evidence so taken and reported by said master, and upon the oral arguments and written briefs then submitted to the Court. Whereupon, upon said stipulation, it
110 was ordered that the said cause be so submitted.

And the Court having considered the pleadings herein, and the said evidence, and the arguments and briefs of the respective counsel herein, and being fully advised in the premises, now makes its findings of fact and conclusions of law as follows:

*Findings of Fact.*

I.

That at all times mentioned in the pleadings herein, the complainant was and now is a citizen of the State of Maryland, and each and all of the defendants herein were and now are citizens of the State of Washington.

II.

That heretofore, on, to wit, the 15th day of May, 1903, the defendants, R. M. Henningsen and Edward W. Clive, being then copartners, entered into a contract in writing with G. S. Bingham, Major and Quartermaster, U. S. Army, representing the Government of the United States, for the erection and construction of certain buildings at Fort Lawton, in the State of Washington, of which said contract a full, true and correct copy is attached to the amended and supplemental bill of complaint herein. That thereafter, at the request of the said defendants, and in accordance with the requirements of the Government of the United States, the said defendants, R. M. Henningsen and Edward W. Clive, and the complainant herein
111 as surety, executed a bond to the United States of America, and delivered the same to the said Major G. S. Bingham, as its representative, in the penal sum of $11,625.00, conditioned as required by the said contract, and by the Government of the United States of America, that the said R. M. Henningsen and Edward W. Clive would in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements in and by said contract agreed and covenanted by the said R. M. Henningsen and Clive to be observed and performed, and that the said Henningsen and Clive would promptly make full payment to all persons supplying labor or materials in the prosecution of the work provided for in said contract. That the said bond was accepted by the said Major G. S. Bingham, and by the Government of the United States of America, as a compliance by the said Henningsen and Clive with the requirements of said contract regarding the furnishing of such a bond, and upon the delivery and acceptance of said bond the said contract for the erection of said building was awarded to the said Henningsen and Clive, and they thereafter entered upon the performance thereof. That subsequently, and before the making by the said Henningsen of the assignment to the defendant, R. R. Spencer, in trust for and for the use of the defendant National Bank

of Commerce, of Seattle, the said Edward W. Clive, withdrew from all participation in the performance of said contract under an agreement between himself and the said Henningsen.

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III.

That the defendants Henningsen and Clive and the defendant Henningsen, fully performed their said contract so far as the completion of the said building was concerned, but the said Henningsen and Clive, and the said Henningsen failed to pay in full all persons supplying labor or materials in the prosecution of the said work, and failed and refused to pay just and lawful claims for labor and materials furnished for said work, amounting in the aggregate to the sum of $15,409.04, and in that respect and to that extent made default in the terms, conditions and obligations of the bond hereinabove referred to, a full, true and correct copy of which bond is set out in the said amended and supplemental bill of complaint. That after the said defendants had so defaulted, the complainant herein instituted in this court a suit, being suit No. 1252 of the suit numbers of this court, in which it was complainant, and in which the said Henningsen and the said Clive, and each and all of the persons to whom said Henningsen and Clive were indebted for such labor and materials were defendants, and in its bill of complaint in said suit confessed its liability under said bond to the said creditors of the said Henningsen and Clive to the full extent of the penalty of said bond, to wit, in the sum of $11,625.00. That in such suit such proceedings were thereafter had that a judgment and decree has been entered therein adjudging and decreeing the said complainant to be indebted to the said defendants, creditors of the said Henningsen and Clive, in the full sum of $11,625.00, and directing, ad-

113 judging and decreeing payment thereof to the said creditors pro rata in the amounts specified in said judgment and decree, and decreeing that upon the payment of the said creditors of said sums, the liability of the said complainant on its said bond should be fully discharged.

IV.

That subsequent to the execution and delivery of the said contract and the said bond, and after the said Clive had ceased to have any connection with the performance of the said contract, and after the said contract had been in large part executed, the said Henningsen executed and delivered to the defendant, R. R. Spencer, in trust for the defendant National Bank of Commerce of Seattle, the written assignment referred to in the pleadings herein, and the order addressed to the said Major G. S. Bingham, Quartermaster, U. S. Army, directing the payment to the said R. R. Spencer, as such trustee, of all moneys owing from the United States of America to the said Henningsen on account of said contract, which assignment and order are referred to in the pleadings herein. That the said assignment and order were executed and delivered by the said Henningsen for the purpose of securing payment to the said Spencer,

as such trustee, of a loan made by the said bank to the said Henningsen on or about the 10th day of October, 1903, amounting to the sum of $3,500, and subsequent loans as specified in the answers herein. That the moneys and all thereof so loaned by the said bank to the said Henningsen were paid by the said bank di-
114 rectly to the said Henningsen, and by him handled and disbursed without any supervision or control upon the part of the said bank or the said Spencer.

V.

That at the time of the commencement of this suit there was in the hands of the Quartermaster of the United States Army, representing the United States of America, the sum of $13,066, earned by the said Henningsen under said contract, which said sum of money the said quartermaster was then about to pay to the said R. R. Spencer, under said assignment and order. That upon the filing of the original bill of complaint herein, the said Henningsen and the said Spencer and the said bank were temporarily enjoined from receiving the said money from the said quartermaster. That thereafter a written stipulation, a full, true and correct copy whereof is attached to the amended and supplemental bill of complaint herein, was entered into between the complainant and the said Henningsen and the said bank and the said Spencer, regarding the receipt and distribution of said money, and under the terms of said stipulation the sum of $8,024.21 of said money was paid to creditors of the said Henningsen, who had performed labor and furnished materials in the performance of said contract, and the balance of said money, to wit, the sum of $5,041.79, was applied in conditional payment and satisfaction of the indebtedness of the said Henningsen to the said bank, amounting to the sum of $5,041.79, and by the terms of said stipulation it was provided and agreed, amongst other things,
115 that in case it should be finally determined by appropriate litigation that the complainant herein was entitled to receive the said portion of said money, that then the said National Bank of Commerce should pay the same to the complainant.

VI.

That the liability and loss of the complainant upon its said bond, as finally disclosed and established by the decree of this court, hereinabove referred to in the suit No. 1,252, exceeds the said sum of $5,041.79; that the said sum of $5,041.79 is still held and retained by the said bank under the terms and conditions and agreements set out in the said stipulation.

*Conclusions of Law.*

I.

That the assignment and order made by the defendant Henningsen to the defendant Spencer, as trustee, are, and each of them is,

and always has been, void and of no force or effect whatsoever as against the complainant.

II.

That the complainant, by reason of the obligation and liability assumed and incurred by it upon the execution of the said bond, and by reason of its loss on account of said bond, is, and at all times mentioned in the pleadings herein has been entitled to receive the said sum of $5,041.79, and the complainant is now entitled to a judgment and decree against the defendant National Bank of Commerce of Seattle, for the said sum, and for its costs and disbursements incurred herein.

116 Dated at Seattle, in the district aforesaid, this 13th day of February, A. D. 1905.

C. H. HANFORD, *Judge.*

[Endorsed:] Findings of Fact and Conclusions of Law. Filed this 13th day of February, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

*Decree.*

This cause having been heretofore submitted to the Court for final decision, and the Court having heretofore made its written findings of fact and conclusions of law herein, now on this 13th day of February, 1905, all of the parties appearing herein in open court, by their respective counsel, the complainant moved for final decree in accordance with said findings and conclusions, which motion, upon due consideration, was granted.

Wherefore, by reason of the law and the facts, it is by the Court here and now ordered, adjudged and decreed as follows:

First. That the assignment heretofore, on, to wit, the 16th day of March, 1904, made and delivered by the defendant, R. M. Henningsen, to the defendant, R. R. Spencer, as trustee, for the defendant National Bank of Commerce of Seattle, which assignment is fully referred to in the pleadings and findings herein, is, and at all times mentioned in the pleadings herein has been, as against the

117 complainant herein, void and of no force or effect whatsoever.

Second. That by reason of the facts set out in the original and amended and supplemental bills of complaint herein, and found and established by the Court from the pleadings and evidence herein, the complainant has, as against the defendants, R. M. Henningsen, Edward W. Clive, The National Bank of Commerce of Seattle, and R. R. Spencer, and each of them, the first and superior lien upon and a right to receive and hold the sum of money amounting to $5,041.79, now held by the defendant, The National Bank of Commerce of Seattle, under the stipulation entered into between the complainant and the said Henningsen and the said bank and the said

Spencer, which stipulation is fully referred to in the pleadings and findings herein.

Third. That the defendant, The National Bank of Commerce of Seattle, forthwith pay into the registry of this court, for the sole use and benefit of the complainant herein, the sum of $5,041.79, and the costs and disbursements of this suit to be taxed, and that upon the payment thereof by the said defendant into the registry of this court, the clerk of this court forthwith pay the same, less the commissions fixed by statute, to the complainant.

Dated at Seattle, in the district aforesaid, this 13th day of February, A. D. 1905.

C. H. HANFORD, *Judge.*

118 [Endorsed:] Decree. Filed this 13th day of February, 1905. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

*Certificate Transferring Cause.*

UNITED STATES OF AMERICA, *District of Washington, ss:*

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, do hereby certify that the foregoing attached papers constitute the complete record in cause No. 1205, wherein United States Fidelity and Guaranty Company is complainant, and R. M. Henningsen and Edward W. Clive, copartners, The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, are defendants, including all papers filed in said cause, and all orders, judgments, and decrees made and rendered by the Court up to and including the 2d day of March, 1905; and that this record is made up and certified for the purpose of transferring said cause to the United States Circuit Court for the Western District of Washington, pursuant to the seventh section of the act of Congress entitled, "An act to divide Washington into two Judicial Districts," approved the 2d day of March, 1905.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court, this, the 26th day of May, 1905.

[SEAL.] A. REEVES AYRES, *Clerk,*
By H. M. WALTHEW,
*Deputy Clerk.*

119 [Title of Court and Cause.]

*Petition on Appeal.*

Now come the defendants, R. M. Henningsen and Edward W. Clive, copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, defendants in the above-entitled cause, conceiving themselves aggrieved by the final arder and decree made and entered herein in this action on the 13th day of February, 1905, whereby, among other things, it was ordered and decreed that the defendant, The National Bank of Commerce of Seat-

tle, forthwith pay into the registry of this court for the sole use and benefit of the complainant herein, the sum of five thousand forty-one dollars and seventy-nine cents ($5,041.79), and the costs and disbursements of this suit to be taxed, do hereby appeal from said final order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignments of error which is filed herewith, and prays that this, its petition for said appeal, may be allowed, and that a transcript of the record, proceedings and papers upon which said final order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that an order be made fixing the amount of security to be given and furnished for said appeal.

G. E. DE STEIGUER,
*Solicitor for Defendants.*

120 The foregoing petition is granted and the appeal allowed upon the giving of a bond or undertaking as required by law in the sum of five hundred dollars.

Dated May 26th, 1905.

C. H. HANFORD,
*District Judge, Presiding in said Circuit Court.*

[Endorsed:] Petition on Appeal. Filed in the United States Circuit Court, Western District of Washington. May 26, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

*Assignment of Errors.*

Now come the defendants, by G. E. de Steiguer, their solicitor, and, in connection with their petition on appeal filed herein, from the final order and decree of this court entered herein on the 13th day of February, 1905, say that said final order and decree, together with the findings of fact and conclusions of law upon which the same was based, are erroneous in the following particulars, to wit:

First. Said Court erred in making any findings whatsoever in regard to the commencement or prosecution of, or judgment or decree in, action No. 1252 referred to in said findings.

Second. The Court erred in concluding in its conclusions of law and in decreeing in its final order and decree that the assignment made to the defendant Spencer referred to in the pleadings
121 herein was void, and in declaring the same of no force or effect.

Third. The Court erred in its conclusions of law in concluding, and in its said final order and decree in finding and establishing, that the complainant has, as against these defendants, or any of them, any lien upon or right to receive the sum of five thousand forty-one dollars and seventy-nine cents (5,041.79), held by the defendant, The National Bank of Commerce of Seattle, or any part thereof, and in

concluding that the complainant was entitled to a judgment and decree against said bank for said sum and for complainant's costs and disbursements.

Fourth. The Court erred in said final order and decree in ordering the defendant, The National Bank of Commerce of Seattle, to pay said sum of five thousand forty-one dollars and seventy-nine cents ($5,041.79), or any thereof, or the costs or disbursements of this suit, into the registry of this court, and erred in ordering that the same be paid to the complainant.

Wherefore, these defendants pray that said final order and decree made and entered herein on the 13th day of February, 1905, be reversed, and that said Circuit Court be directed to enter an order and judgment herein denying to the complainant any right to or lien upon said sum of five thousand forty-one dollars and seventy-nine cents ($5,041.79), so held by the defendant, The National Bank of Commerce of Seattle, and finding and declaring that said bank is entitled to retain the same in payment, or partial payment, of
122 its claims set forth in the answer to the amended bill of complaint.

G. E. DE STEIGUER,
*Solicitor for Defendants.*

[Endorsed:] Assignments of Error. Filed in the United States Circuit Court, Western District of Washington, May 26, 1905. A. Reeves, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

*Bond on Appeal.*

Know all men by these presents, that we, The National Bank of Commerce of Seattle, as principal, and H. C. Henry and C. J. Smith, as sureties, acknowledge ourselves to be jointly and severally indebted and held and firmly bound unto the above-named complainant and respondent, United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of five hundred dollars for the payment of which we jointly and severally bind ourselves and each of us, and each of our heirs, executors, administrators and successors by these presents.

In witness whereof, the said principal has caused its corporate name to be hereunto signed and its corporate seal hereunto affixed, and the said sureties have hereunto set their hands and seals this 26th day of May, 1905.

The condition of this obligation is such that:

Whereas in the above-entitled court and action a final order and decree was rendered in favor of the complainant and against
123 the defendants on the 13th day of February, 1905; and

Whereas, the above-named defendants have taken an appeal from said final order and decree to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, therefore, if the said R. M. Henningsen, Edward W. Clive,

copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation shall be void; otherwise it shall remain in full force and virtue.

And we, the said H. C. Henry and C. J. Smith, the sureties abovenamed, do hereby expressly consent and agree that in case of any breach in the conditions of this obligation, the said Circuit Court may, upon notice to us of not less than ten days, proceed summarily in the suit in which said bond is given, to ascertain the amount which we are bound to pay on account of such breach, and render judgment therefor against us or either of us, and award execution therefor.

NATIONAL BANK OF COMMERCE,
SEATTLE, WASH.,
[SEAL.] By H. C. HENRY, *Its President.*
And by R. R. SPENCER,
*Its Cashier and Secretary.*
H. C. HENRY. [SEAL.]
C. J. SMITH. [SEAL.]

124 STATE OF WASHINGTON, *Western District of Washington, County of King, ss:*

H. C. Henry and C. J. Smith, being each first severally sworn, does each of and concerning himself, depose and say: I am one of the sureties named in and executing the foregoing bond; I am not an attorney or counsellor at law, sheriff, clerk or marshal or officer of any kind whatsoever of any court of the State of Washington, or of any court of the United States, or of any court whatsoever; I am worth the sum of five hundred dollars in property situated within the State of Washington and within the Western District of the State of Washington, over and above all my debts and liabilities and exclusive of property exempt from execution.

H. C. HENRY.
C. J. SMITH.

Subscribed and sworn to before me this 26th day of May, 1905.

[NOTARIAL SEAL.] G. E. DE STEIGUER,
*Notary Public in and for the State of Washington, Residing at Seattle.*

The foregoing bond is hereby approved this 26th day of May, 1905.

C. H. HANFORD,
*Presiding Judge.*

125 [Endorsed:] Bond on Appeal. Filed in the United States Circuit Court, Western District of Washington, May 26, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

[Title of Court and Cause.]

*Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA,
*Western District of Washington, ss:*

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify that the foregoing one hundred and thirty (130) typewritten pages, numbered from 1 to 130, inclusive, to be full, true and correct copies of all the files, records and proceedings in the above and therein entitled cause, as the originals thereof now remain on file and of record in my office at Seattle, in said District; and that the same constitute the record on the appeal therein to the United States Circuit Court of Appeals for the Ninth Circuit of the defendants above named, from the final order and decree of the Circuit Court of the United States for the Western District of Washington, rendered and entered on the 13th day of February, 1905.

I further certify that I annex hereto and transmit herewith the original citation issued in said cause.

I further certify that the cost of the foregoing record is the sum of $117.70, and that the same has been paid to me by George
126 E. de Steiguer, attorney for appellants above named.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 19th day of June, 1905.

[SEAL.] A. REEVES AYRES, *Clerk*,
By H. M. WALTHEW,
*Deputy Clerk.*

[Title of Court and Cause.]

*Citation.*

UNITED STATES OF AMERICA, *ss:*

The United States of America, to the Above-named Complainant, United States Fidelity and Guaranty Company of Baltimore, Maryland, and to Carr & Preston, Its Solicitors; Silvester E. Brown (Doing Business as S. E. Brown & Company), One of the Interveners in the Above-entitled Action, and to George Hawley, His Solicitor; to Bryant Lumber and Shingle Mill Company, a Corporation, One of the Interveners in the Above-entitled Action, and to Ballinger, Ronald & Battle, Its Solicitors; to Carstens Packing Company, a Corporation, E. C. MacDougall and H. T. Dinham, Copartners as E. C. MacDougall & Company, Interveners in the Above-entitled Action, and to Kerr & McCord, Their Solicitors; W. O. Nelson, E. E. Caine, and the C. B. Smith Company, a Corporation, Interveners in the Above-entitled Action, and to William Hickman Moore, Their Solicitors:

127 You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Ap-

peals for the Ninth Circuit at the City of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, in a suit in equity wherein said United States Fidelity and Guaranty Company of Baltimore, Maryland, is complainant and appellee, and the said R. M. Henningsen, Edward W. Clive, copartners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer are defendants and appellants, and the said Silvester E. Brown (doing business as S. E. Brown & Company), Bryant Lumber and Shingle Mill Company, a corporation, Carstens Packing Company, a corporation, E. C. MacDougall and H. T. Dinham, copartners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company are interveners, to show cause, if any there be, why the order and decree of said Circuit Court in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court, this 26th day of May, 1905.

[SEAL.] C. H. HANFORD,
*United States District Judge Presiding in said Circuit Court for the Western District of Washington.*

128 Due service of the within citation and receipt of a copy thereof, and also due service of the defendants' petition on appeal and assignment of errors acknowledged this 26th day of May, 1905.

CARR & PRESTON,
*Solicitors for Complainant, United States Fidelity & Guaranty Company of Baltimore, Maryland.*
GEO. A. HAWLEY,
*Solicitor for Sylvester E. Brown.*
BALLINGER, RONALD & BATTLE,
*Solicitors for Bryant Lumber & Shingle Mill Company.*
KERR & McCORD,
*Solicitors for Carstens Packing Company, E. C. MacDougall, and H. T. Dinham, Copartners as E. C. MacDougall & Company.*
WM. HICKMAN MOORE,
*Solicitor for W. O. Nelson, E. E. Caine, and The C. B. Smith Company.*

[Endorsed:] No. 1205. In the Circuit Court of the United States, for the Western District of Washington, Northern Division. United States Fidelity and Guaranty Co. *vs.* R. M. Henningsen *et al.* Citation. Filed in the United States Circuit Court, Western District of Washington. May 26, 1905. A Reeves Ayres, Clerk. H. M. Walthew, Dep. Service of papers in this case may be made upon G. E. de Steiguer, Attorney for Defendants, at No. 618 New York Blk., Seattle, Washington.

129 [Endorsed:] No. 1212. United States Circuit Court of Appeals, for the Ninth Circuit. R. M. Henningsen, Edward W. Clive, Copartners, and The National Bank of Commerce of Seattle (a Corporation), and R. R. Spencer, Appellants, *vs.* United States Fidelity and Guaranty Company of Baltimore, Maryland, and Interveners, Sylvester E. Brown, Doing Business as S. E. Brown & Company, Bryant Lumber and Shingle Mill Company (a Corporation), Carstens Packing Company (a Corporation), E. C. MacDougall and H. T. Dinham, Copartners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company (a Corporation), Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court, for the Western District of Washington, Northern Division.

Filed June 22, 1905.

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER, *Deputy Clerk*.

130 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants
*vs.*
UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Transcript.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-nine (129) pages, numbered from one (1) to one hundred and twenty-nine (129), inclusive, including the index and cover thereto, to be a true copy of the printed transcript of record upon appeal from the United States Circuit Court for the Western District of Washington, Northern Division, in the above-entitled case, as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 23rd day of July, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

131 No. 1212.

United States Circuit Court of Appeals for the Ninth Circuit.

R. M. HENNINGSEN ET AL., Appellants,
*vs.*
UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees,

*Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

132 In the United States Circuit Court for the District of Washington, Northern Division.

No. 1252.

UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation, Complainant,
*vs.*
E. E. CAINE, W. O. NELSON, W. H. HUNTER ET AL., Defendants.

I, A. Reeves Ayres, Clerk of the above entitled court, hereby certify that since the rendition and entry of the judgment in the above entitled action the complainant, the United States Fidelity & Guaranty Company, paid into the registry of the above entitled court the full amount of said judgment, to wit, the sum of eleven thousand five hundred ninety-four & 50/100 ($11594.50) dollars, and that the same has been drawn out of the registry of this court by the creditors of Henningsen and Clive, in whose favor said judgment was rendered, and that the said judgment has been fully satisfied and discharged by the said complainant, the United States Fidelity & Guaranty Company, all of which appears from the records in my office.

In witness whereof, I have hereunto set my hand and the seal of the above entitled court this 27th day of October, 1905.

[SEAL.] A. REEVES AYRES, *Clerk*,
By H. M. WALTHEW,
*Deputy Clerk.*

(Endorsed:) No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. R. M. Henningsen, Edward W. Clive, *et al.*, Appellants, *vs.* United States Fidelity & Guaranty Company, *et al.*, Appellees. Certificate of Clerk of court below as to satisfaction of judgment. Filed Oct. 31, 1905. F. D. Monckton, Clerk.

133 At a stated term, to wit: the October term, A. D. 1905 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Fran-

cisco, on Wednesday, the first day of November in the year of our Lord one thousand, nine hundred and five.

Present: Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable Thomas P. Hawley, District Judge.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants,
*vs.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees.

*Order of Submission.*

Upon consideration of the stipulation of counsel for the respective parties, heretofore filed therefor,

It is ordered that the appeal in this cause be, and hereby is submitted to the Court for consideration and decision on briefs, pursuant to the terms of the said stipulation.

134 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants,
*vs.*
UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN (Doing Business as S. E. Brown & Company) ET AL., Appellees.

*Opinion U. S. Circuit Court of Appeals.*

Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

The record shows that on the 15th of May, 1903, the appellants R. M. Henningsen and Edward W. Clive, then being copartners, entered into a contract in writing with G. S. Bingham, Major and Quartermaster, U. S. Army, representing the Government of the United States, for the construction of certain buildings at Fort Lawton, in the State of Washington, for the faithful performance of which contract on the part of Henningsen and Clive they, as principals, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, executed a bond to the United States conditioned that Henningsen and Clive would in all respects duly and fully perform all of their agreements and obligations specified in the contract, and would promptly make full payment to all persons supplying labor or materials in the prosecution of the work therein provided for; which bond was accepted by the Government,

upon which acceptance the contract was awarded to Henningsen and Clive, and its performance entered upon by them. Subse-
135 quently and before the making by Henningsen of the assignment to the defendant Spencer, afterwards mentioned, Clive withdrew from participation in the performance of the contract under an agreement between himself and Henningsen. The contract, in so far as concerned the completion of the buildings, was fully performed, but the contractors failed to pay in full all persons supplying labor and materials in the prosecution of the work, and failed and refused to pay just and lawful claims for such labor and materials amounting, in the aggregate, to $15,409.04, and in that respect and to that extent made default in the terms, conditions, and obligations of the bond. After the contractors had so defaulted, the surety commenced suit in the court below against Henningsen, Clive, and each of the persons to whom they were indebted for such labor and materials, stating in its bill its liability upon the bond to such creditors to the full extent of the penalty of the bond, to wit, the sum of $11,625., which suit resulted in a decree adjudging the surety company indebted to such creditors of Henningsen and Clive in the full sum of $11,625., and directing payment thereof to the creditors *pro rata*, and decreeing that upon making such payment the liability of the surety on the bond be discharged

Subsequent to the execution of the bond and contract, and after Clive, under his agreement with Henningsen, had ceased his connection with the performance of the contract, and after the latter had been in large part executed, Henningsen executed to the defendant Spencer, in trust for the defendant National Bank of Commerce, of Seattle, an assignment of the balance of the money coming to him under the contract, and directing the Quartermaster to pay over to Spencer all such moneys. The purpose of the assignment was to secure the repayment of a loan made by the bank to Henningsen on or about October 10, 1903, of $3500, and subsequent loans of $1000 and $370. All of the money so loaned by the bank to Henningsen was paid by it directly to him, who disbursed
136 it without any supervision or control upon the part of the bank or of Spencer.

At the time of the commencement of the present suit by the surety, there was in the hands of the Quartermaster, representing the United States, the sum of $13,066, earned by Henningsen under the contract, which sum of money the Quartermaster was about to pay over to Spencer in pursuance of the aforesaid assignment and order. The object of this suit was, in part, to prevent such payment and to obtain a decree that such assignment and order were invalid. Upon the filing of the original bill in the court below, Henningsen, the bank, and Spencer were temporarily enjoined from receiving the money from the Quartermaster, after which a written stipulation was entered into between the complainant surety, Henningsen, Spencer, and the bank, pursuant to the terms of which $8024.21 of the $13,066 were paid to creditors of Henningsen, who had performed labor and furnished materials in the performance of the contract, and the balance, to wit, $5041.79, was applied in con-

ditional payment and satisfaction of the indebtedness of Henningsen to the bank, which amounted to $5041.79—the stipulation further providing that in the event it should be finally determined by appropriate litigation that the complainant surety was entitled to receive the last-mentioned amount, the bank would pay the same to it. The liability and loss of the surety, as finally established and decreed by the court below, in the suit hereinbefore referred to, having exceeded the said sum of $5041.79, the court below held that the surety company was equitably entitled to receive the said sum of $5041.79, and accordingly gave judgment against the bank for that sum, with costs. It does not appear that at the time that judgment was entered the surety had in fact paid to the laborers and material men the full penalty of its bond, as asked for and decreed in the suit brought by it against time and others, but it appears from the certificate of the Clerk of the court below, filed in this
137 court, that the complainant has since done so; so that the judgment of the court below is the judgment to which the appellee is entitled, if its equity to the balance of the fund is superior to that of the bank.

George E. de Steiguer, Solicitor for Appellants.
Graves, Palmer, Brown & Murphy, Solicitors for Appellee.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Ross, Circuit Judge, after stating the case as above, delivered the opinion of the court:

The real question in the case is one of priority of equities as between the bank and the surety company. In the first place, it is to be noted that it does not appear that the money loaned to Henningsen by the bank was loaned upon the agreement on his part to use it in the performance of the contract in question, nor does it appear that as a matter of fact it was so used. Spencer, the trustee, and cashier of the bank, being asked whether Henningsen made any statement as to the purpose for which he wished to borrow money, answered:

"A. Yes; he stated at the time that he was being hampered on his Fort Lawton contract by the fact that the inspector was giving him short estimates and that he would have to have money to carry the contract through; he also stated that there were some little items of debt on the Mary Island contract, the owners of which were bothering him and that he wished to get this money for the purpose of meeting his pay-rolls and making payment on material on
138 the Fort Lawton contract and to liquidate the items mentioned above in the Mary Island contract.

Q. Did he make any explanation to you as to whether the items of debt on the Mary Island contract had anything to do with the prosecution of his work on the Fort Lawton contract?

A. He said that they were threatening to sue him and that he was afraid it would absolutely prevent him from going ahead with

his work, fearing others to whom he was owing money on the Fort Lawton contract would do the same thing.

Q. Did he make any statement as to the respective amounts which he expected to use on the different contracts?

A. He did not."

Spencer was further questioned, and testified as follows:

"Q. At the time you made Mr. Henningsen the first advance, being that for thirty-five hundred dollars, was there any arrangement between you and him as to the securing of payment of that note?

A. There was.

Q. What was that agreement?

A. He agreed he would assign and turn over to us the payments received on this contract."

The assignment by Henningsen to Spencer and the acceptance of the order by the Quartermaster of the fund which he expected to disburse for the Government, was void as against the United States, the surety, the laborers, and the material men. R. S. U. S., Secs. 3477, 3737; Prairie State Bank *v.* United States, 164 U. S. 227; McKnight *v.* United States, 98 U. S. 179; Spofford *v.* Kirk, 97 U. S. 484; United States *v.* Gillis, 95 U. S. 407; Greenville Savings Bank *v.* Lawrence, 76 Fed. 545.

Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled
139 to assert the equitable doctrine of subrogation, but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money. Prairie State Bank *v.* United States, *supra;* Insurance Company *v.* Middleport, 124 U. S. 534; Sheldon on Subrogation, Sec. 240. Certainly the bank cannot be justly said to have any sort of equity to the entire sum of $5041.79, for it is not pretended that in making its loans to Henningsen it was understood that he was to use *all* of the money so loaned in the performance of the contract in question. It is equally difficult to see how an equity in its behalf can attach to any specific part of the fund in controversy, for the reason that the facts of the case leave it altogether indefinite and uncertain as to how much of the money loaned by the bank to Henningsen it was understood he was to use in the performance of this particular contract.

When we come to look at the equities on the part of the surety company, we find that it paid what it was compelled to pay—the full penal sum of its bond, to the laborers and material men by reason of its pricipal's failure to pay them, exceeding in the aggergate the amount of the fund in controversy. That bond was given under and in pursuance of the provisions of the Act of Congress approved August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works" (28 Stats. 278), one of the purposes of which Act was, as held by the Circuit Court of Appeals for the Eighth Circuit, in United States *v.* National Surety Company, 92 Fed. 549 and by this court in United States *v.* Rundle, 100 Fed. 400, "to afford full protection to all persons who supplied materials or labor in the construction of public build-

ings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be for the labor and materials so supplied. There was no occasion for legislation
140 on the subject to which the Act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the Government." The bond required by that Act, and in pursuance of which the bond under consideration was given, was, as said in the cases cited, "intended to perform a double funtion,—in the first place, to secure to the Government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the Government, and the one for the benefit of third prsons—are as distinct as if they were contained in separate instruments, the Government's name being used as obligee in the latter agreement merely as a matter of convenience."

Where, as in the Prairie State Bank and the Rundle cases, *supra*, the surety is compelled to make good the default of his principal as respects the Government, the surety is, as was distinctly held in those cases, entitled to be subrogated to the rights of the Government. Upon precisely the same principle the surety is entitled to be subrogated to the rights of the laborers and material men, where, as in the present case, it is compelled by reason of the obligations of the bond to pay them for labor and material because of the default of its principal. That right of subrogation relates back, as was held by the Supreme Court in Prairie State Bank *v.* United States, *supra*, to the time the contract of suretyship was entered into. See, also First National Bank of Seattle *v.* City Trust Safe Deposit Surety Co.,
141 *et al.*, 114 Fed. 529; Richards Brick Co. *v.* Rothwell, 18 App. Cas. (Dist. of Col.) 516.

The judgment is affirmed.

(Endorsed.) Opinion. Filed February 12, 1906. F. D. Monckton, Clerk.

142 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE, a Corporation, and R. R. SPENCER, Appellants,

*vs.*

UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN (Doing Business as S. E. Brown & Company) ET AL., Appellees.

*Decree U. S. Circuit Court of Appeals.*

Appeal from the Circuit Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed and entered February 12, 1906. F. D. Monckton, Clerk.

143 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. A. NELSON, E. E. CAINE, and the C. B. SMITH COMPANY (a Corporation), Appellees.

*Petition for Appeal.*

Now come the appellants, R. M. Henningsen, Edward W. Clive, Co-partners, and The National Bank of Commerce of Seattle, a corporation, and R. R. Spencer, by their Solicitor, G. E. de Steiguer, and respectfully show:

That in the above entitled cause there was rendered and filed a judgment in the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco in the State of California, in the above entitled and numbered cause, on the 12th day of February, 1906, affirming the decree of the United States Circuit Court for the Western District of Washington, Northern Division in said cause, and that thereby, in said affirmance manifest error has intervened to the great damage of the petitioners;

That the matter in controversy in said suit exceeds the sum of One Thousand Dollars besides costs, and exceeds the sum of Five Thousand Dollars, besides costs, and that this is not a case in
144 which the decision of the Circuit Court of Appeals is made final, and is a proper case to be reviewed by the Supreme Court of the United States upon appeal;

That said cause arose under the laws of the United States and in particular, under "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, and involves the construction of said Act and of the bond required under said Act; and that said cause further arose under Sections 3477 and 3737, Revised Statutes of the United States, and involves the construction thereof;

Wherefore, petitioners pray for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and that a transcript of the record and proceedings on which said decree was based, duly authenticated, be sent to the Supreme Court of the United States; and for such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected.

G. E. DE STEIGUER,
*Solicitor for Appellants.*

W. W. WILSHIRE, *Counsel.*

The petition granted and appeal allowed on giving bond in the sum of One Thousand Dollars conditioned as the law directs, this the 20th day of June, 1906.

WM. B. GILBERT,
*United States Circuit Judge for the Ninth Circuit.*

(Endorsed:) Petition for, and Order Allowing Appeal. Filed June 18, 1906. F. D. Monckton, Clerk.

145 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

*Assignment of Errors.*

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file therewith their assignment of errors, as to which matters and things they say: That the decree entered herein on the 12th day of February, 1906, is erroneous, to wit:—

1. The Court erred in affirming the decree of the Circuit Court, and in not reversing the same.

2. The Court erred in holding that laborers or material men upon Government work have any right to or lien upon the amount to be paid by the Government to the contractors for such work; and there being no such right, the Court erred in holding that the complainant, the Surety upon the contractor's bond for the performance of such work and the payment of such laborers and material men, had a right of subrogation to such rights or liens of laborers or material men.

146 3. The Court erred in holding that said Surety had such right of subrogation without first paying the claims of such laborers and material men.

4. As the record shows that the respondent in the Circuit Court contended that the laborers and material men had no right to the fund in controversy, and as this contention was upheld by the Circuit Court, the Circuit Court of Appeals erred in not holding that the respondent was thereafter estopped from claiming that such laborers and material men had such right to said fund, and that the respondent was entitled to be subrogated thereto.

5. It did not appear at the time the judgment was entered by the Circuit Court that the surety had in fact paid to the laborers and material men the penalty of its bond, but it is stated in the opinion of said Circuit Court of Appeals that it appears from a certificate of the Clerk of the Circuit Court that the complainant had since done so. The Circuit Court of Appeals erred in considering said certifi-

cate and in basing its opinion, decision and judgment affirming the judgment of the Circuit Court upon facts transpiring since the judgment of said Circuit Court was entered.

6. In case said surety was entitled to any subrogation whatsoever, the court erred in extending such subrogation to any amount in excess of the twenty per cent. stipulated by the contract to be reserved until full performance of the work upon the contract.

7. In the absence of any right to the fund on the part of the complainant, the court erred in holding that the respondent Bank was not entitled to retain the same both by reason of the consent of the other defendants by their answer, and by virtue of the
147 assignment to Spencer for the use of the Bank which was good as between the parties, and only void as against the Government of the United States, and those subrogated to its rights.

8. The Court erred in holding that the complainant had on any account whatsoever, any lien upon, or right to the sum of Five Thousand and Forty-one Dollars and Seventy-nine Cents ($5041.79) held by the defendant, The National Bank of Commerce of Seattle, or any part thereof, and erred in rendering judgment for the payment of the same by said Bank to the complainant.

Wherefore, the appellants pray that said final order and decree of the Circuit Court and of the Circuit Court of Appeals be reversed, and that said Circuit Court be directed to enter an order and judgment herein denying to the complainant any right to or lien upon said sum of Five Thousand and Forty-one Dollars and Seventy-nine Cents ($5041.79) held by the appellant, The National Bank of Commerce of Seattle, and find that said Bank is entitled to retain the same in payment or partial payment of its claim set forth in the answer to the Amended Bill of Complaint.

G. E. DE STEIGUER,
*Solicitor for Appellants.*

W. W. WILSHIRE,
*Counsel.*

(Endorsed:) Assignment of Errors. Filed June 18, 1906. F. D. Monckton, Clerk.

148 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners, and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. Brown & Company; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MacDougall & Company; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

*Bond.*

Know all men by these presents: That we, The National Bank of Commerce of Seattle, as principal, and H. C. Henry and C. J. Smith, as sureties, acknowledge ourselves to be jointly and severally indebted and held and firmly bound unto the above-named complainant and respondent, United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of One Thousand Dollars, for the payment of which we jointly and severally bind ourselves and each of us, and each of our heirs, executors, administrators and successors by these presents.

In witness whereof, the said principal has caused its corporate name to be hereunto signed and its corporate seal hereunto affixed, and the said sureties have hereunto set their hands and seals this 13th day of June, 1905.

149 The condition of this obligation is such that: Whereas, in the above entitled court and action a final order and decree was rendered in favor of the complainant and against these appellants on the 12th day of February, 1906; and

Whereas the above named appellants have taken an appeal from said final order and decree to the Supreme Court of the United States; Now therefore, if the said appellants shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation shall be void; otherwise, it shall remain in full force and virtue.

And we, the said H. C. Henry and C. J. Smith, the sureties above named, do hereby expressly consent and agree that in case of any breach in the conditions of this obligation, the said Circuit Court may, upon notice to us of not less than ten days, proceed summarily in the suit in which said bond is given, to ascertain the amount which we are bound to pay on account of such breach, and render

judgment therefor against us or either of us, and award execution therefor.

NATIONAL BANK OF COMMERCE,
By H. C. HENRY, *Its President,*
And by O. A. SPENCER, *Its Secretary.*
H. C. HENRY. [SEAL.]
C. J. SMITH. [SEAL.]

150 STATE OF WASHINGTON,
*Western District of Washington, County of King, ss:*

H. C. Henry and S. J. Smith being each first severally sworn, does each of and concerning himself, depose and say: I am one of the sureties named in and executing the foregoing bond: I am not an attorney or counsellor at law, Sheriff, Clerk or Marshal, or officer of any kind whatsoever of any court of the State of Washington, or of any court of the United States, or of any court whatsoever; I am a resident and householder within the Western Judicial District of the State of Washington; I am worth the sum of One Thousand Dollars in property situated within the State of Washington, and within the Western District of Washington, over and above all my debts and liabilities, and exclusive of property exempt from execution.

H. C. HENRY.
C. J. SMITH.

Subscribed and sworn to before me this 13th day of June, 1906.
S. G. GRAVES,
*Notary Public in and for the State of Washington, residing at Seattle.*

The foregoing bond is hereby approved this 20th day of June, 1906.
WM. B. GILBERT,
*United States Circuit Judge for the Ninth Circuit.*

(Endorsed:) Bond on Appeal to Supreme Court U. S. Filed June 20, 1906. F. D. Monckton, Clerk.

151 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN ET AL., Appellants,
*vs.*
UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, ET AL., Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, Etc.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

twenty-one (21) pages, numbered from one (1) to twenty-one (21), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed, as the same remain of record in my office; and that the same in connection with the preceding certified copy of the printed transcript of record upon appeal from the United States Circuit Court for the Western District of Washington, Northern Division, constitute a true copy of the printed record upon which the above-entitled case was heard in the said Circuit Court of Appeals and of all proceedings had therein, and the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled case.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 23rd day of July, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

152 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1212.

R. M. HENNINGSEN, EDWARD W. CLIVE, Copartners and THE NATIONAL BANK OF COMMERCE OF SEATTLE (a Corporation) and R. R. SPENCER, Appellants,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and Intervenors, SYLVESTER E. BROWN, Doing Business as S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY (a Corporation), CARSTENS PACKING COMPANY (a Corporation), E. C. MACDOUGALL and H. T. DINHAM, Copartners as E. C. MACDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE, and THE C. B. SMITH COMPANY (a Corporation), Appellees.

*Citation.*

THE PRESIDENT OF THE UNITED STATES:

To United States Fidelity and Guaranty Company of Baltimore, Maryland, and to the Intervenors, Sylvester E. Brown, doing business as S. E. Brown & Company, Bryant Lumber and Shingle Mill Company (a corporation) Carstens Packing Company (a corporation) E. C. MacDougall and H. T. Dinham, Co-partners as E. C. MacDougall & Company, W. O. Nelson, E. E. Caine and the C. B. Smith Company (a corporation), Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, in the District of Columbia, sixty days after the date of this citation,

pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein R. M. Henningsen, Edward W. Clive, co-partners, and The National Bank of Commerce of Seattle (a corporation) and R. R. Spencer are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said
153 appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wm. B. Gilbert, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 20th day of June, 1906.

WM. B. GILBERT,
*Judge of the United States Circuit Court of Appeals for the Ninth Circuit.*

Due service of the within citation and receipt of a copy thereof, and also due service of the appellants' petition on appeal and assignment of errors acknowledged this 29th day of June, 1906.

JAMES B. MURPHY,
GRAVES, PALMER & MURPHY,
*Solicitors for United States Fidelity & Guaranty Company of Baltimore, Maryland.*
GEO. A. HAWLEY,
*Solicitor for Sylvester E. Brown.*
BALLINGER, RONALD & BATTLE,
*Solicitors for Bryant Lumber & Shingle Mill Company.*
KERR & McCORD,
*Solicitors for Carstens Packing Company, E. C. MacDougall and H. T. Dinham, Co-partners as E. C. MacDougall & Company.*
WM. HICKMAN MOORE,
*Solicitor for W. O. Nelson, E. E. Caine and The C. B. Smith Company.*

154 [Endorsed:] Form No. 102. Docketed. No. 1212. In the Circuit Court of Appeals of the United States for the 9th Circuit. R. M. Henningsen *et al.*, Appellants, *vs.* United States Fidelity & Guaranty Co. *et al.*, Appellees. Citation. Filed Jul- 12 1906. F. D. Monckton, Clerk. Service of papers in this case may be made upon G. E. de Steiguer, Attorney for Appellants, at Room 618, New York Block, Seattle, Washington.

Endorsed on cover: File No. 20,326. U. S. circuit court of appeals, 9th circuit. Term No. 361. R. M. Henningsen and Edward W. Clive, copartners; The National Bank of Commerce of Seattle, and R. R. Spencer, appellants, *vs.* United States Fidelity & Guaranty Company of Baltimore, Md.; Sylvester E. Brown, doing business as S. E. Brown & Company; Bryant Lumber & Shingle Mill Company; Carstens Packing Company; E. C. MacDougall and H. T. Dinham, copartners as E. C. MacDougall & Company; W. O. Nelson; E. E. Caine, and The C. B. Smith Company. Filed August 7, 1906. File No. 20,326.

No. 361

# In the Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners, THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and R. R. SPENCER,

*Appellants*,

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland, and intervenors, SYLVESTER E. BROWN, doing business as S. E. Brown & Company, BRYANT LUMBER AND SHINGLE MILL COMPANY (a corporation), CARSTEN'S PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDougall & Company, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

*Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

## Brief of Appellants

W. W. WILSHIRE,
*Solicitor for Appellants*

GEORGE E. DE STEIGUER,
*Of Counsel*

NEW YORK BLOCK
Seattle, Washington

The Ivy Press, Second and Cherry, Seattle.

IN THE

# Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners, THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and R. R. SPENCER,

*Appellants,*

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland, and intervenors, SYLVESTER E. BROWN, doing business as S. E. Brown & Company, BRYANT LUMBER AND SHINGLE MILL COMPANY (a corporation), CARSTEN'S PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDougall & Company, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

*Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

## Brief of Appellants

### STATEMENT OF THE CASE.

This case was brought in the Circuit Court by the United States Fidelity & Guaranty Company, of Baltimore, against the appellants, for the purpose of enjoining the payment to appellants of the final estimate due upon a contract with the United States Government and of establishing the alleged right of the complainant to receive such payment.

On May 12, 1903, the defendants, Henningsen and Clive, entered into a contract with the United States for

the construction of certain buildings at Fort Lawton, Washington, for the aggregate price of $46,500.00 (printed record, pp. 28, 34, 35). The contract contained the following provision: "In all payments, 20 per centum of each to be retained until the final completion and acceptance by the Government of the work under contract." (p. 35.) The contract did *not* contain any clause providing for the retention of any portion of the payments to secure payment of persons supplying labor or material. Henningsen and Clive, as principals, and the complainant as surety, made and delivered to the United States a bond in the penal sum of $11,625.00, conditioned: First, for the performance of the contract for the construction of the buildings at Fort Lawton; and, second, for the full payment of all persons supplying labor or materials in the progress of the work (p. 36). Thereafter, the defendant Clive withdrew from active performance of this contract (pp. 30, 59).

Beginning with October 10, 1903, and ending with May 14, 1904, Henningsen borrowed from The National Bank of Commerce of Seattle amounts aggregating $4,870.00, giving his notes therefor, upon which there was due at the time of the commencement of this action $5,044.79.

At this time, to secure the payment of these notes, Henningsen, on behalf of his firm, agreed to turn over to the bank the payments on the contract with the Govern-

ment, and thereafter, on March 16, 1904, assigned all payments thereon then due or thereafter to become due and gave an order directed to Captain F. A. Grant, United States Quartermaster at Seattle, for the delivery of all checks for any balance on the contract to Spencer, the cashier of the bank. In obtaining the loan from the bank, Henningsen stated that he was obtaining the same for the purpose of meeting his pay roll and to pay for material on the Fort Lawton contract, and also to pay a small indebtedness arising from a former contract which he had with the Government, which indebtedness threatened to interfere with his Fort Lawton contract (pp. 47-53).

To avoid any misunderstanding, we wish to concede at this time that the making of these loans did not entitle the bank to subrogation to the rights, if any, of either the United States or the laborers or material men, and to further concede that if the surety company is entitled to subrogation to any right of the United States Government arising through the Henningsen contract, the bank can make no claim by reason of the assignment. As will be hereafter stated, our claim is totally different. But we deem it proper to state the facts with reference to this assignment and the loan for the purpose of showing that Henningsen in joining in this appeal does so, not for the purpose of defeating any just claim of the surety, but for the purpose of carrying out his agreement with the bank, which he can and should do in the absence of a prior claim on the fund in favor of the surety company.

About the beginning of June, 1904, the work on the Fort Lawton contract having been substantially completed, the Government, through the quartermaster at Seattle, was about to pay to the contractors the balance due on the contract; and it was arranged that the checks therefor should be turned over to Spencer, in accordance with the assignment and order hereinbefore set forth, to be applied in so far as necessary in payment of the bank's claim (pp. 5, 6, 30). The complainant thereupon filed with the Secretary of War its petition asking him to disregard, and to instruct his subordinate officers to disregard the assignment, and to cause the sums due on the contract to be applied in payment of the contractors' indebtedness for labor and materials. The War Department decided that this petition should be disregarded, and arranged to pay the whole amount remaining due on the contract to the contractors on the 9th day of May, 1904 (p. 6). To prevent this payment, the complainant commenced this action on June 8, 1904, alleging substantially the facts hereinbefore set forth, and asking that the appellants be enjoined from receiving the money, and that the court compel the payment thereof to the laborers and material men on the contract (pp. 3-7).

On June 17, 1904, the complainant and the defendants entered into a stipulation providing that all the money then due from the United States Government, amounting to $13,066.00, should be paid over to the defendant Spencer, and that of this amount, all, except the

sum of $5,041.79, then due the bank, should be disbursed by the said Spencer in part payment of certain claims for labor and material furnished in the performance of the Fort Lawton contract. This agreement provided that the $5,041.79 so retained by the bank should be subject to this litigation, and that the rights of none of the parties to this action should be prejudiced by the agreement (p. 37). The amount so to be paid out to the creditors was disbursed in accordance with the stipulation (p. 51).

While the suit was pending on demurrer to the answer, Sylvester E. Brown, E. C. MacDougall & Co., Carstens Packing Company, Bryant Lumber & Shingle Mill Company, W. O. Nelson, The C. B. Smith Company and E. E. Caine, by leave of the court, filed a petition and bill in intervention setting out the Fort Lawton contract, the bond for the performance thereof, the payment of the money to Spencer, as hereinbefore set forth, and the fact that a portion thereof was reserved until the determination of this action, to be disposed of as the court might determine. The intervenors further set out that they were respectively creditors of Henningsen and Clive on account of labor and material done and furnished in the performance of the contract. The intervenors asked that the amount reserved by Spencer be paid to them on account of their claims for labor and material (pp. 35-42). Both the complainant, the Surety Company, and the defendants, these appellants, moved to strike this bill of intervention on the ground, among other things, that it

appeared upon the face of the bill that no legal or equitable ground of intervention existed in favor of the intervenors (pp. 24, 25). This motion was granted by the court, the court holding that none of the intervenors had any legal or equitable ground of intervention, and that none of them had any lien upon or right to the fund in question (p. 27).

Thereafter, the complainant filed an amended and supplemental bill of complaint. This amended and supplemental bill, in addition to various facts set out by the original bill, set up the making of the stipulation under which the final payment from the Government was paid to Spencer, stated that of the amount so paid $8,024.21 was paid to the creditors of Henningsen and Clive in accordance with the stipulation, and that the balance, $5,041.79, was held by the bank subject to the terms of the stipulation. It further alleged that, after the payment to the creditors as aforesaid, there remained due to the creditors of the contractors, who were entitled to share in the penalty of the bond, more than thirteen thousand dollars. It further set out that it had commenced a suit in equity against the various creditors of Henningsen and Clive on the contract in question, and had therein tendered itself as ready to pay into the registry of the court the full penalty of the bond for distribution among the defendants, as their rights should be established (pp. 28-33). An answer was interposed to this bill, setting up the claim of the bank against Henningsen, and the as-

signments and orders on the fund. The making of the stipulation and the payment of a portion of the money and the retention of the remainder thereunder was admitted, as was also the making of the contract and the bond. The defendants, however, denied on information and belief the amount remaining due to the creditors, and also denied any information as to the action in equity in question, except that such an action had been brought against some or all of the persons claiming to be creditors on the contract. A general replication was filed to this answer. No proof was offered in support of the amended bill.

Thereafter the cause was submitted, and the court rendered its memorandum decision on the merits.

So far as the matters in controversy here are concerned, the following quotations from this opinion will suffice to show the nature of the decision:

> "In the main controversy I hold that the contractor made default in the condition of the bond by failing to pay for materials and labor, and that by default the bonding company became absolutely liable for the full amount of the penalty of the bond. To such liability an equitable right attached to have the balance due from the Government on account of the contract applied to the debts of the contractor secured by the bond. The defaulting contractor could not defeat this equit-

able right by an assignment of the payments to be made by the Government. The bank, as assignee, occupied no better position than the assignor to resist the application of the payments in reduction of debts secured by the bond. Therefore it will be decreed that the bank pay into the registry of the court the balance of the money which it received under the stipulation and the taxable costs of the litigation made by its controversy." * * * "Upon paying into court the full amount of the penalty of the bond, the bonding company will be entitled to be dismissed, absolved from all liabilities upon the bond in suit." (p. 56.)

Thereafter the court made findings of fact and conclusions of law and a decree was entered thereon (pp. 57-62). The decree departed from the memorandum decision in this: The decision held that the complainant had an equitable right to have the balance due from the Government applied to the debts of the contractors secured by the bond. The decree ordered that the sum held by the bank be paid into court for the sole use and benefit of the complainant.

In its findings, conclusions and decree the Circuit Court decided that the assignment to Spencer was void, and that the complainant, by reason of the obligation and liability assumed by its execution of the bond, was entitled to receive the money held by the bank.

It nowhere appears that the complainant, at the time of the entry of this decree by the Circuit Court, had made any payment whatsoever to the creditors of Henningsen and Clive. It further appears that the complainant has no intention of completely satisfying their claims.

From the decree of the Circuit Court, these appellants appealed to the Circuit Court of Appeals for the Ninth Circuit (pp. 62-68). Pending this appeal, there was filed with the clerk of the Circuit Court of Appeals a certificate or statement, dated October 27, 1905, from the clerk of the Circuit Court, entitled in the cause of the United States Fidelity and Guaranty Company vs. E. E. Caine, et al., to the effect that since the judgment in that case, the United States Fidelity and Guaranty Company paid into the registry of the Circuit Court the full amount of said judgment, to-wit: $11,594.50; that the same had been drawn out by the creditors of Henningsen and Clive in whose favor the judgment was stated to be rendered, and that the judgment had been fully satisfied by the complainant, the United States Fidelity and Guaranty Company (p. 69).

Thereafter the Circuit Court of Appeals rendered its opinion and decree, affirming the decree of the Circuit Court (pp. 70-74). The Circuit Court of Appeals referred to the certificate of the clerk of the Circuit Court as showing that the complainant had paid the full penalty of its bond (p. 72). The substantial ground for its

decision will be found in the last paragraph of the opinion, and as there expressed is substantially this: The surety is entitled to be subrogated to the rights of the laborers and material men where it is compelled by reason of the obligations of the bond to pay them for labor and material because of the default of its principal.

The Court, however, based this conclusion in part upon Sections 3477 and 3737, U. S. Revised Statutes, declaring certain assignments of claims against the Government void, and upon the provisions of 28 U. S. Statutes at Large, 278, requiring the bond in question.

## SPECIFICATION OF ERRORS.

The assignments of error are set forth on pages 77 and 78 of the printed record. Omitting the general and formal assignments, the specifications may be more briefly stated as follows:

1. The court erred in holding that laborers or material men upon Government work have any right to or lien upon the amount to be paid by the Government to the contractors for such work; and there being no such right, the court erred in holding that the complainant, the surety upon the contractor's bond for the performance of such work and the payment of such laborers and material men, had a right of subrogration to such rights or liens of laborers or material men.

2. The court erred in holding that said surety had such right of subrogation without first paying the claims of such laborers and material men.

3. As the record shows that the respondent in the Circuit Court contended that the laborers and material men had no right to the fund in controversy, and as this contention was upheld by the Circuit Court, the Circuit Court of Appeals erred in not holding that the respondent was thereafter estopped from claiming that such laborers and material men had such right to said fund and that the respondent was entitled to be subrogated thereto.

4. It did not appear at the time the judgment was entered by the Circuit Court that the surety had in fact paid to the laborers and material men the penalty of its bond, but it is stated in the opinion of said Circuit Court of Appeals that it appears from a certificate of the clerk of the Circuit Court that the complainant had since done so. The Circuit Court of Appeals erred in considering said certificate and in basing its opinion, decision and judgment affirming the judgment of the Circuit Court upon facts transpiring since the judgment of said Circuit Court was entered.

5. In case said surety was entitled to any subrogation whatsoever, the court erred in extending such subrogation to any amount in excess of the twenty per cent.

stipulated by the contract to be reserved until full performance of the work upon the contract.

6. In the absence of any right to the fund on the part of the complainant, the court erred in holding that the respondent was not entitled to retain the same, both by reason of the consent of the other defendants by their answer, and by virtue of the assignment to Spencer for the use of the bank, which was good as between the parties, and only void as against the Government of the United States and those subrogated to its rights.

## ARGUMENT.

### I.

Our contention is that the contract, so far as the United States is concerned, had been fully performed, so that there was no right of the Government to which the surety company could be subrogated; that the creditors furnishing labor and material had no lien upon the fund, and that therefore there was no right in their favor to which the surety company could be subrogated; that therefore the War Department was entitled to pay it to the contractors or to their assignee, the bank, and that either the contractors or the bank was entitled to receive it. We therefore respectfully submit that the Circuit Court of Appeals was in error in stating that "the real question in the case is one of priority of equities as be-

tween the bank and the surety company." The real question is whether the surety company had any equity whatsoever.

It must recover, if at all, on the strength of its own right. This right must be something more than the general right of a creditor to be paid. It must be something in the nature of a lien, legal or equitable, upon the particular fund.

We are somewhat embarrassed by the multiplicity of inconsistent grounds assigned for the right of the surety company. The Circuit Court held that the laborers and material men had no lien upon or right to the fund. The Circuit Court of Appeals held, by implication, that they had such right, and expressly held that the surety company was entitled to be subrogated thereto. The Circuit Court in its memorandum decision held that the surety company had an equitable right to have the balance due from the Government applied to the debts of the contractor. Its decree orders the bank to pay the whole amount in its hands to the surety company for its own use and benefit, though the debts of the contractor secured by the bond had not been paid, though the amount of the penal obligation of the bond was not sufficient to pay them, and though (as was held by the Circuit Court) the creditors themselves had no right to the fund.

We may, however, assume that the complainant claims the fund through the right of subrogation and bases its claim upon—

*Prairie State Bank vs. United States*, 164 U. S. 227;

*First National Bank of Seattle vs. City Trust, Safe Deposit and Surety Company*, 114 Fed. 529;

*Greenville Savings Bank vs. Lawrence*, 76 Fed. 545;

*Lawrence vs. United States*, 71 Fed. 228;

*Reid vs. Pauly*, 121 Fed. 652;

*Richard Brick Company vs. Rothwell*, 18 App. Cases D. C. 516.

These cases, except *Reid vs. Pauly*, were all based, and the contention of the surety company in this case is founded, upon "an Act for the protection of persons furnishing materials and labor for the construction of public works" (28 U. S. Statutes at Large, 278), approved August 13, 1894, which contains the following provision:

> "Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly

> make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract;"

and upon bonds given in pursuance thereof, and also upon certain provisions of the contracts which the bonds were given to secure.

All of the cases mentioned have certain points in common with this case, but (with the exception of *Richard Brick Company vs. Rothwell*) in other features differ from the present case, and the facts in which they so differ are precisely the facts on which in each case the decision of the court in favor of the surety company was based.

In the Prairie State Bank case, the contractor had defaulted and the surety assumed performance of the contract, completed the work, and in so doing disbursed an amount in excess of the reserved final payment, being in that case ten per cent. of the contract price. The court held that the surety, having performed for the United States Government the work which his principal, by his contract, was required to perform, was entitled to be subrogated to the rights of the United States in the ten per cent. reserved for the Government's protection.

In the present case, the work had been completed by the original contractor, and the object for which the twenty per cent. was to be retained had been fulfilled, and to quote from the contract providing for this reten-

tion, there had been a "final completion and acceptance by the Government of the work under contract." The Government had, therefore, no claim against Henningsen for which it was entitled to withhold this twenty per cent., and, as the original bill stated, the Government was about to pay over the money.

In the First National Bank case above cited, the contractors abandoned the contract, and the sureties completed the same. In addition, the contract contained a clause providing for the retention of thirty per cent. of the contract price to secure the payment of laborers and material men. Neither of these facts exist in the present case. Without again discussing the principles involved in the Prairie State Bank case, we quote from the opinion in the First National Bank case on page 532, as follows:

> "By abandoning the contract the contractors lost the right to compel the city to pay them any sum whatsoever on account of the work which they had done. Their assignee, the bank, stood in no better position than they. The city undoubtedly had the right to declare the contract and all unpaid sums which it had promised to pay thereunder, forfeited."

It thus appears that the decision is based upon a default of which the city which held the fund could take advantage.

Furthermore, in that case there is a dissenting opinion by a member of this court, holding that the rule in the Prairie State Bank case had been misapplied and that the surety was not entitled to be subrogated to any part of the sum due the contractors, except the amount, the retention of which was stipulated for in the contract. This matter will be considered later.

In

*Greenville Savings Bank vs. Lawrence*, 76 Fed. 545;

*Lawrence vs. United States*, 71 Fed. 228, and

*Reid vs. Pauly*, 121 Fed. 652,

the contract expressly provided for a retention of a portion of the purchase price until laborers and material men were paid.

It thus appears that the decision in each of these cases was founded upon the fact, either that the contractors had failed to perform their contract and the sureties had completed the performance thereof for the Government, or that the contract provided for the retention of a portion of the contract price until laborers and material men were paid. In the present case, neither of these facts is found. The original contractors finished the work for the Government; and the contract contained no stipulation for retaining any part of the amount due for the payment of laborers and material men.

Therefore, in the present case, there is no default of which the Government can take advantage. So far as it is concerned, the contract has been fully performed.

This view is supported by—

*United States vs. Rundle*, 100 Fed. 400, and

*United States vs. National Surety Co.*, 92 Fed. 549.

As stated in these cases, a bond conditioned as the bond in this case is of a dual nature, and in effect may be regarded as two bonds; first, a bond for the benefit of the United States and securing the completion of the work; and second, a bond for the benefit of laborers and material men, and securing the payment of their claims. So far as the latter phase of the bond is concerned, the United States is not a real party in interest, being merely a nominal obligee. When the work is completed, the United States has no further interest in the bond.

In *United States vs. Rundle, supra*, it appears that the work on the contract had been completed, though all claims for labor and material had not been paid. The court, alluding to these facts, says:

> "The United States, having received such full performance, received all that it was entitled to, and therefore, had no cause of action upon the bond."

There was, therefore, no right or equity left in the United States to which the complainant could be subrogated.

*Liles vs. Rogers*, 113 N. C. 197; S. C. 37 Am. St. Rep. 627.

The laborers and material men never had any right to the fund.

Aside from some statutory or contract provision, laborers or material men have no claim, legal or equitable, either against the property improved, or the contract price.

*Lawrence vs. United States*, 71 Fed. 228;

*Canal Co. vs. Gordon*, 6 Wallace 561, 571;

*Withrow Lumber Co. vs. Glasgow Investment Co.*, 101 Fed. 863-868;

*Mechanics and Traders National Bank vs. Winant*, 1 N. Y. S. 659-660;

*Randolph vs. City of New York*, 53 Howard's Practice 68;

*Phillips on Mechanic's Liens*, Sec. 1;
20 Am. & Eng. Enc. Law. (2nd Ed.), 269, 293.

Of course, in no case is there such a claim in the case of public property.

20 Am. & Eng. Enc. Law (2nd Ed.), 295.

There is but one case cited by appellee which supports its contention in this case, and that is

*Richards Brick Co. vs. Rothwell*, 18 App. Cases, D. C. 516.

This case does hold that the persons furnishing labor and material have an equitable right to have the balance of the purchase price applied in payment of their claims, and that if a surety discharges these claims, it is entitled to be subrogated to this equitable right. So far as we have been able to ascertain, this rule has never been laid down in any other jurisdiction. In so far as the equitable right of the claimants is concerned, it is opposed in principle to the cases decided by the Supreme Court of the United States and other courts hereinbefore cited. So far as we are able to recall, not only does this rule not prevail in other jurisdictions, but it has rarely, if ever, been claimed. While courts have frequently stated that a right of this character is purely statutory, they have done so, not because anyone claimed the contrary, but by way of explaining their construction and limiting the effect of mechanics' lien statutes.

The case of

*Lawrence vs. the United States*, 71 Fed. 228,

cited by the appellee, negatives any lien or right of subrogation in favor of the surety company in this case, to the same extent as it negatives any right of subrogation on the part of the bank. It is stated on page 230:

> "A surety pays the debt of his principal. He is subrogated to all the rights of the creditor, and is entitled to the protection of all the collaterals held by him,—rights which he can enforce.

But these laborers and material men have no rights, as against the government,—rights which can be enforced. There is no privity between them and the government. They are recipients of its bounty, debtors to its good will, objects of its provident care, in whose favor, *suo motu*, it exercises its right and privilege to withhold the money until their claims are satisfied. Nor have they any specific interest in the money so withheld. It is not necessarily applicable to their claims. Lawrence could satisfy them in any way, and, upon evidence that their claims were arranged, he could get the money which had been withheld. So 'subrogation' is not the term to be applied to this transaction. If subrogation existed at all, it must be as to the rights of the laborers and material men to whom Lawrence paid the money the bank lent to him. As has been seen, they had no rights."

On page 233, the court says:

"There is still another view of this case. The contract gave to the United States the right and privilege of withholding a part of the contract price, for a specified reason,—that laborers and material men were not promptly paid. This right and privilege the United States could exercise or not, at its option. Until it was exercised, Lawrence could demand the money earned on his contract."

It therefore appears that in the Lawrence case, even though the contract provided for the retention of a portion of the fund for the benefit of the laborers and material men, they had no claim upon the fund until the government had exercised its option to withhold the fund for their benefit.

In the present case the contract provided for the retention of the twenty per cent. until the final completion and acceptance by the Government of the work under contract, not that this per cent. or any amount whatsoever might be retained until persons furnishing labor or materials were paid. This stipulation is for the benefit of the Government alone. It cannot by construction be extended beyond its plain terms for the benefit of the laborers and material men. They have no right to the fund, and the Government has no right to retain the fund for their benefit when the conditions of the contract, so far as the Government is concerned, have been performed. Further, the Government has not claimed or attempted to exercise any option to withhold the money for the laborers and material men. It was about to pay the money to the contractors, and for that reason respondent brought this suit.

In brief, therefore, we contend that the complainant cannot be subrogated to any rights of the Government, because the contract had been fully performed and the Government had lost all interest in the retention of the

fund; and that the complainant cannot be subrogated to the rights of the laborers or material men, because the fund was not retained for their benefit and they have no interest therein to which the right of subrogation can attach.

It has been contended by the appellee that a surety who undertakes performance of his principal's obligations, is entitled to all the moneys, securities and liens of his *principals*. We know of no such rule. A surety does not acquire a general lien over all the property of the principal obligor, but in general stands, with reference to him, as does any other creditor. It is frequently stated, however, that a surety, upon performing his principal's obligation, does become entitled to all the liens, and securities of the *creditor*. This rule, is, however, always subject to the implied qualification that the liens and securities must be such as the creditor would have been entitled to enforce for the particular obligation which the surety discharges. In other words, the surety may acquire the right of the original creditor, but he cannot acquire any greater rights. This limitation of the rights of the surety by those of the creditor is so obvious and elementary that we will simply cite the court to text book authority. See:

27 Am. & Eng. Enc. Law. (2d Ed.), page 206.

Applying this principle, if the surety in this case had paid the claims of laborers and material men, this would

not have entitled it to any lien upon the fund held by the United States and which both under the provisions of the contract and the universal legal rule, irrespective of the contract, the Government would have been entitled to withhold until the work was performed. The surety could only prevail by establishing some rule by virtue of which the creditors whose claims it paid had a lien on the fund in question.

II.

Assuming, however, for the sake of the argument, that the creditors had some right to this fund, and that the complainant might acquire the right by subrogation, the complainant has not complied with the conditions necessary to entitle it to this right. Aside from the certificate of the clerk of the Circuit Court hereafter discussed, there is nothing whatever in the record to show that the complainant has ever paid any part of the claims of the laborers and material men. The right of subrogation does not arise until the surety has made such payment.

*Aetna Life Insurance Co. vs. Middleport*, 124 U. S. 534;

*Prairie State Bank vs. United States*, 164 U. S. 231;

*Conwell vs. McCowan*, 53 Ill. 363;

*Columbia Finance & Trust Co. vs. Kentucky Union Railway Co.* (C. C. A. Sixth Circuit) 60 Fed. 794;

*Vert vs. Voss*, 74 Ind. 565;
*James vs. Day*, 37 Iowa 164.

Not only is there no showing that the complainant ever has paid the laborers and material men, but it appears that the amount of their claims exceeds the amount of the penalty of the bond. If the complainant claims to be entitled to subrogation to the rights of the creditors, the contention amounts to this: Though this bond was given to the United States for the security of laborers and material men, the complainant, by right of subrogation to their rights, is entitled to take the fund arising from the contract, and leave the persons primarily secured unpaid.

In considering this question, it is important to bear in mind that the relief granted the appellee by the lower court was,

> "That the defendant * * * forthwith pay into the registry of this court *for the sole use and benefit of the complainant herein*, the sum of $5,041.79." (Record, page 62.)

The order was not made for the benefit of laborers or material men, and the relief granted was not in any manner contingent or collateral. In most of the cases cited, by respondents below, the original creditor was consenting to the partial subrogation. He was willing to share his lien with the surety. In none of the cases cited by respondents below is it held that the surety is entitled to

receive the proceeds of the creditor's securities when he has made no payment whatsoever on the creditor's claims.

The appellee argues that the appellants are not concerned in this question. Henningsen is a party to this appeal. He is certainly interested in and entitled to be heard upon the question as to whether his surety shall receive this money if it has made no payment whatsoever to the creditors. The result of such a procedure would be that the surety would receive the money as a pure bonus, Henningsen would fail to receive his payment from the government, and he would still remain bound for the debts, on account of its collateral obligation for which the surety claims the right to receive the fund.

III.

As the respondent contended in the lower court in its motion to strike the bill of intervention that the laborers and material men had no equities (pp. 25 and 28), and thereby secured a decision from that court that the laborers and material men

> "have not and none of them has any lien upon or against or right to the fund heretofore paid to the National Bank of Commerce of Seattle and begin a portion of the sum paid on the contract of the defendants Henningsen and Clive with the United States Government" (p. 27).

the respondent is now estopped to contend the contrary. It must try its case in this court upon the same theory and legal principles upon which it tried it in the lower court. It should not be permitted, in the hope of securing in some manner a larger share of the fund, to obtain from the lower court a decision that the creditors had no right or lien to the fund in question, and then, to obtain an affirmance of the judgment, come into this court and claim that the creditors have such a lien and that the appellee is entitled to be subrogated thereto. Upon this point we cite:

*Davis vs. Wakelee*, 156 U. S. 680, 689;

*Philadelphia, etc., Railroad vs. Howard*, 13th Howard (U. S.) 307;

*Railroad Company vs. McCarthy*, 96 U. S. 258, 267;

*Hodges vs. Winston*, 95 Ala. 514;

*Abbot vs. Wilbur*, 22 La. Ann. 368;

*Savings & Trust Company vs. Bear Valley Irr. Co.*, 112 Fed. 693, 704.

In the last case cited, the Court says: "A party is not permitted to assume inconsistent positions in the same litigation."

It has been intimated by the appellee that the court made this ruling upon some point of procedure. The order striking the bill of intervention shows, however, that the court considered the merits of their claim and decided

"* * * that said intervenors have not, and none of them has, any lien upon or against, or right to the fund. * * * (Printed Record, page 27).

## IV.

As has already been stated, at the time of the entry of the decree of the Circuit Court it was not shown that the surety company had made any payments whatever on the claim of the laborers and material men; and so far as we know, no payment whatsoever had in fact then been made thereon. Long after the appeal to the Circuit Court of Appeals had been perfected, the clerk of the Circuit Court made out a statement, which was filed with the clerk of the Circuit Court of Appeals, to the effect that the surety company had paid $11,594.50 into the registry of the Circuit Court; that the same had been drawn out by the creditors of Henningsen and Clive, and that the judgment in the action of the *United States Fidelity and Guaranty Company vs. Caine* had been fully satisfied by the complainant (p. 69). It is to be noted:

(a) That this certificate does not state that any such payment had been made at the time of the decree by the Circuit Court, but the contrary is to be inferred.

(b) That this certificate is made out in an action other than that now before the court.

(c) That it does not purport to be a copy of any document either in this case or that case.

(d) That the amount paid into court was less than twelve thousand dollars, while the total amount of these creditors' claims was more than twenty thousand dollars (p. 29).

We contend that upon elementary principles of law this certificate should not have been considered by the Circuit Court of Appeals; that the decree of the Circuit Court should have been sustained or reversed upon the evidence before that Court and the facts as they then existed; that the so-called certificate, so far as these appellants are concerned, was hearsay; that the satisfaction by complainant of any judgment in that action could not be evidence that the creditors of Henningsen and Clive had been paid, and that even if such certificate was competent to show the payment into court in question, the amount thereof was not sufficient to satisfy the claims of the creditors and would not entitle the complainant to receive the balance due upon the contract. On incompetency of this certificate see

*Hudgins vs. Kemp*, 18 How. 530, 534.

V.

The contract price agreed to be paid to Henningsen and Clive was $46,500, and the amount stipulated to be retained thereon until the final completion and acceptance of the work contracted for was twenty per cent., or $9,300 (p. 35). Under stipulation of the parties to this action there was paid to the complainant, after the commencement of this suit and before the filing of the amended bill, $8,024.21 of this amount, being the whole twenty per cent. except the sum of $1,275.79; but the Circuit Court and the Circuit Court of Appeals gave judgment in favor of the complainant and against the bank, not simply for this amount, but for the amount of $5,041.79 which was deposited with the bank under the terms of the same stipulation. The fact that the representatives of the Government, at the completion of their work, had on hand to the credit of the contractors, more than twenty per cent. of the contract price, was merely an accident. It was not retained in pursuance of any contract right; and neither the surety on the bond nor the laborers or material men could have required it to be retained, or could have had any right to the surplus above the twenty per cent., even if it was retained. Therefore, if the complainant was entitled to anything, it could not have been, in addition to what it did receive, more than the sum of $1,275.79. This position is fully sustained by the Prairie State Bank

case as construed by a member of this court in the case of

*First National Bank vs. City Trust, Safe Deposit & Surety Co.*, 114 Fed. 534.

VI.

If the complainant has no lien upon or peculiar right to the fund in question, the defendants, Henningsen and Clive, had a right to see that it was applied in payment of the bank's claim in pursuance of Henningsen's agreement, and this would be true, even if no effect were given to the assignment. However, Sec. 3477, U. S. Rev. St., declaring such assignments void, has been held by the courts to have been passed for the protection of the United States only, and not to prevent the assignment being good as between the parties themselves.

*York vs. Conde*, 147 N. Y. 486;

*Conde vs. York*, 168 U. S. 642;

*In re Hone*, 153 N. Y. 552;

*Dulaney vs. Scudder*, 94 Fed. 6;

*Lopez vs. United States* (U. S. Court of Claims), 2 L. R. A. 571.

Considering such prohibitions, this court has held:

"Their purpose was not to dictate to the contractor what he should do with the money re-

ceived on his contract after the contract had been performed."

*Hobbs vs. McLean*, 117 U. S. 567, 576.

Furthermore, even if the complainant is entitled to subrogation to some lien or equity of Henningsen's creditors, it is not shown when the claims of these creditors arose. Under the reasoning of the Prairie State Bank case, the equity of these creditors would attach not when the bond was given, but when, thereafter, they voluntarily furnished the materials or labor. If, therefore, the assignment to Spencer was good as between the parties, the complainant has made no showing that the equities, to which it claims subrogation, arose before the date of the transfer to Spencer.

Respectfully submitted,

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GEORGE E. DE STEIGUER,
Of Counsel.

# In the Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation), and R. R. SPENCER, *Appellants.*

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER & SHINGLE MILL COMPANY (a corporation), CARSTENS PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDOUGALL & COMPANY, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation), *Respondents.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

## Brief of Appellants—On Motion to Dismiss

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## Brief of Appellants—On Motion to Dismiss

### STATEMENT.

As a general statement of the nature of action, little need be added to the statement contained in the brief of the respondents, designated as the brief of the defendants in error. Relating to the question of jurisdiction, however:

The bill of complaint alleged that the defendants, Henningsen and Clive, entered into a contract with the United States for the construction of certain buildings.

That these contractors were required to present with their contract a bond, being the bond under which the complainant, now the respondent, claimed in this case.

That the respondent, in consideration among other things of the provisions of the United States Statutes making null and void any assignment or assignments of any sums which might become due on the contract, joined in the bond, and, together with the contractors, made, executed and delivered the bond.

A copy of the bond is referred to in the bill of complaint and attached thereto, and shows upon its face that it was executed in pursuance of and conditioned according to the terms of the Act of Congress of August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works."

28 *Statutes at Large*, 278.

Paragraph V of the bill alleges that a certain sum of money, being a part of the contract price, "is now in the hands of the United States".

Paragraph VI of the bill of complaint states that the defendants, Henningsen and Clive, "contrary to the Statute of the United States in that behalf", had executed and delivered an assignment to the defendant bank

or to the defendant Spencer of moneys to become due under the contract.

Paragraph VIII alleges that the complainant, here respondent, had applied to the Secretary of War asking that the assignment be disregarded, but that nevertheless the quartermaster at Seattle was about to pay out the full amount of the contract to the contractors, and that the contractors would pay the same to the bank or Spencer.

The prayer of the complaint asked that the assignment in question be declared to be null and void as against the complainant, that the defendants be enjoined from receiving any money under the contract and be ordered to permit the same to remain in the possession of the United States and its official representatives pending the final determination of the cause. So far as jurisdictional questions are concerned, it is unnecessary to quote or cite the remainder of the bill, as it is along the same lines as the part already referred to. Printed Record, pages 3 to 8.

The memorandum decision, findings of facts and conclusions of law and decree of the Circuit Court recites that the decision is based upon the contract and bond in question, construes the bond, and declares the assignment of the fund void and of no force or effect whatsoever as against the complainant. (pp. 56-62). The opinion of the Circuit Court of Appeals takes up in detail and dis-

cusses the construction of the bond in connection with the Statute under which it was given and the Statutes of the United States (Rev. St. Secs. 3477, 3737), under which it is held that the assignment of the fund is void. (pp. 70-74).

## ARGUMENT.

The jurisdiction of this court, of course, depends upon the grounds of jurisdiction of the Circuit Court. The respondent Surety company makes several objections to this jurisdiction.

1. The first and only substantial objection is that no question under the law of the United States was involved in the case. In fact there were several federal questions involved.

It appears upon the face of the original bill of complaint that the complainant claimed through its rights arising from a bond given to the United States government under the Act of August 13, 1894.

While this Act is not referred to specifically, the bond is conditioned precisely as provided for by that act and the court will take judicial notice that the bond was given in accordance with the act.

The action affected a fund then in possession of the United States government and complainant prayed that

the parties be compelled to permit said fund to remain in the possession of the United States government.

The bill alleged that the assignment to certain of the defendants, now appellants, was void under the laws of the United States, and prayed that said assignment be declared to be void.

In the main, all these questions were passed upon by the Circuit Court and were again passed upon by the Circuit Court of Appeals, which in its opinion not only decided the federal questions involved, but specifically referred to the various Statutes in question and based its decision upon those Statutes.

There can be no question that the respondent intended in its bill of complaint to invoke the Statutes of the United States declaring void certain assignments or funds due, or to become due, on public contracts. This question is fairly presented in the bill of complaint, was alluded to by the Circuit Court and more expressly decided by the Circuit Court of Appeals.

Our objections to the conclusions reached it is unnecessary to state here, but there can be no question that from the filing of the bill of complaint down to the decision of the Circuit Court of Appeals, the construction of the Statutes in question was in issue.

The fact that the rights of the complainant, as claimed in its bill of complaint, acrose through a bond re-

quired and given under the Statutes of the United States, is sufficient to sustain the jurisdiction of the Circuit Court on the ground that the cause arose under a Statute of the United States.

*Howard vs. United States*, 184 U. S. 676;

*Sonnentheil vs. Christian Moerlein Brewing Company*, 172 U. S. 401;

*Feibelman vs. Packard*, 109 U. S. 421, 423;

*Bachrack vs. Norton*, 132 U. S. 337;

*Reagan vs. Aiken*, 138 U. S. 109;

*Bock vs. Perkins*, 139 U. S. 628, 630.

In *Howard vs. United States, supra*, it is stated at page 681, "The suit was directly upon a bond taken by the Circuit Court in conformity with the Statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those Statutes". "It was therefore a suit arising under the laws of the United States, of which the Circuit Court (concurrently with the courts of the State) was entitled to take original cognizance, even if the parties had been citizens of the same State. * * *

"It results that although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon federal grounds. And as the case was one which could not have been brought here directly from the Circuit Court, the final judgment of the Circuit Court of Appeals could be reviewed in this court upon writ of error sued out by the defendants".

In this case the bond was required not by the judicial but by the executive branch of the government, and from the time of the filing of the bill of complaint down

to the decision of the Circuit Court of Appeals, it was conceded that the case, at least in part, depended upon the scope and effect of that bond and the meaning of the Statute under which it was given.

In addition to the cases of this court already cited on similar bonds, we will cite:

*Walker vs. Windsor Nat. Bank* (C. C. A. First Circuit) 56 Fed. 76, where it was held that a suit upon the official bond of the cashier of a national bank, given to the association pursuant to Revised Statutes, Section 5136, Clause 5, providing for such bonds, was a suit arising under the laws of the United States.

2. The respondent also objects to the jurisdiction of this court, for the reason that the respondent (being the complainant below), made no sufficiently clear statement of its claim under the Statutes of the United States to comply with the rules of good pleading. It is apparent from the record that the statement of the complainant was sufficiently definite to call forth a ruling by the Circuit Court, and a still more specific and definite ruling from the Circuit Court of Appeals.

The bill of complaint clearly showed that the cause of action arose out of a bond required by the Statutes of the United States, that the complainant claimed its rights through said bond and against a fund in the possession

of the United States, and that it invoked a Statute of the United States for the purpose of having declared void an assignment to appellants herein.

The facts requiring the application of a federal statute being stated, the court will take judicial notice of that statute.

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid.

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in this case' ".

*Bridge Proprietors vs. Hoboken Co.*, 1 Wallace 116, 142.

From the case of:

*Warner vs. Searle and Hereth Co.*, 191 U. S. 195, 205,

we quote as follows:

"In the present case, diverse citizenship, and requisite amount, existed, and the Circuit Court, therefore, had jurisdiction, but it is argued that the jurisdiction

depended entirely on diversity of citizenship, and hence that the decision of the Circuit Court of Appeals was final. We think, however, that as infringement of a trade-mark registered under the act was charged, the averments of the bill, *though quite defective*, were sufficient to invoke the jurisdiction also on the ground that the case arose under a law of the United States, and will not, therefore, dismiss the appeal".

To the same effect see:

*Northern Pacific Railway Company vs. Soderberg*, 188 U. S. 526, 528.

Furthermore, it will be seen that, as the respondent in this case, both in the Circuit Court and the Circuit Court of Appeals, has relied upon its alleged rights under the laws of the United States, it should now be bound by its contentions there made.

*Cooke vs. Avery*, 147 U. S. 375, 386.

In *Union Pacific Railway Company vs. Harris*, 158 U. S. 326, 327, an argument very similar to that made in this case seems to have been made, but the objection to the jurisdiction was overruled, and with reference thereto it was stated:

"In the present case jurisdiction was invoked on the ground of diverse citizenship, and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental, and, further, that as the case did not involve the validity or construction of the charter of plaintiff in error, no federal question arose. It is not for us to enquire why writs of error to Circuit Courts of Appeals in actions for damages for negligence of railroad corporations should be allowed simply because the cor-

porations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language. Nevertheless, as plaintiff below appears to have really proceeded on the ground of diverse citizenship, we think there was color for the motion to dismiss although, as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it."

In *Northern Pacific Railroad Company vs. Amato*, 144 U. S. 466, where the case was removed from the State Court to the Federal Court, no more specific ground of jurisdiction appears to have been stated than that the cause of action arose under an act of Congress by which the corporation was created.

3. It is further objected by the respondent that the appellants have not by their assignment of error sufficiently raised any federal question. The assignments of error, must, of course, be construed with reference to the record presented. In answer to the contention of the respondents, we think it sufficient to state:

(a) It will clearly appear from the assignments of error, considered in connection with the statement in the brief heretofore filed herein that the Statutes of the United States were construed by the Circuit Court of Appeals in its decision of this cause, that the appellants contend that that construction is erroneous and that the construction by them contended for will require a reversal of this case.

(b) If the cause arose under the laws of the United States, we deem it immaterial whether an error is assigned in their construction or not. If this cause were brought up from the Supreme Court of a State, we would be required to show that a right claimed by us under the Constitution or the laws of the United States was decided adversely to our contention. In the present case, under the statute it is only required that we show that jurisdiction was originally taken by the Circuit Court, on the ground, among other grounds, that the cause arose out of a statute of the United States. As illustrating this point, we will simply allude to the case of,

*Union Pacific Railway Company vs. Harris, supra,* where it clearly appears that this court took jurisdiction of a cause arising out of a law of the United States, though no error in the construction of that law appears to have been presented to the court or decided. The law out of which the cause arose was a statute incorporating the Union Pacific Railway Company. The alleged errors considered related entirely to other matters, such as the negligence of the company and the competence of the plaintiff to execute a release of his cause of action.

Where the Appellate Court has jurisdiction by reason of the cause arising out of a law of the United States, it will decide not only the questions on which the jurisdiction is based but all other questions involved; in other words it will decide the case.

*Osborn vs. U. S. Bank*, 9 Wheat. 739 (p. 823);
*Horner vs. United States*, 143 U. S. 570.

4. It is objected by the respondent that it raised a federal question, if at all, only by anticipating a defense of these appellants. The only ground of jurisdiction upon which this point has even a semblance of application is the claim that the assignment to Spencer was void under the laws of the United States. The point has no real application even to this ground of jurisdiction. It was not the claim of the defendants which arose under the statute, but the claim of the complainant that the assignment was void. The assignment itself was admitted, in fact alleged, in the bill, and one of the objects of the action was to secure a decree of the court declaring this assignment void, and the ground on which such a decree was asked was the Federal Statute.

5. We think it unnecesary to comment on the theory that no jurisdiction was shown in the Circuit Court under a law of the United States, because the allegations of the bill showing this jurisdiction were not contained in the jurisdictional clause, but in some other portion of the bill.

Respectfully submitted,

W. W. WILSHIRE,

Solicitor for the Appellants.

GEORGE E. de STEIGUER,

Of Counsel.

IN THE

# Supreme Court of the United States

R. M. HENNINGSEN and EDWARD CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation), and R. R. SPENCER,

*Appellants,*

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY (a corporation); E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

*Appellees.*

APPEAL FROM THE CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

## BRIEF OF APPELLEES

HAROLD PRESTON,
CARROLL B. GRAVES,
EDWARD B. PALMER,
JAMES B. MURPHY,
*Solicitors for Appellee.*

IN THE

# Supreme Court of the United States

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R. M. HENNINGSEN and EDWARD CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation), and R. R. SPENCER,

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UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY (a corporation); E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

*Appellees.*

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## STATEMENT OF THE CASE.

The statement of the case by the appellants is in the main correct, except that it might be inferred that the testimony fully sustained the allegations of the appellants as set forth in their answer. Their proof does not come up to their allegations—it does not show that any of the money loaned by the appellant bank in question to Hen-

ningsen was used in the fulfillment of the contract in question. In fact, all that the testimony does show is that Henningsen represented to Spencer he needed the money to complete the Fort Lawton contract and to settle a claim on another government contract. The money was passed by the bank to Henningsen's credit and checked out by him when and for what he chose to use it. It does not appear to whom these checks were paid, or that any of them went towards completing the said contract (p. 52).

The record shows that on October 10, 1903, five months after this appellee entered into its contract of suretyship, the appellant bank loaned Henningsen the principal part of the amount in question, taking only a promissory note, and it was not until March 16, 1904, that Henningsen made the assignment of moneys due under the contract to Spencer (p. 53-5).

The amended bill (p. 32) shows that suit had been commenced by this appellee in the Circuit Court to decide the rights of the respective claims of laborers and materialmen against the contractors. This appellee admitted the liability of its contract to the full amount and offered to pay it in court. Surely a court has a right to take judicial notice of its records and judgments.

Appellants seem to lay great stress on the fact that the memorandum decision of the Circuit Court and decree differ in that the former held that the appellee had the right to have the balance due from the government ap-

plied to the debts of the contractors, while the latter ordered the sum held by the bank be paid into court for the sole use and benefit of the appellee. The decision ordered the surety to pay the full penalty of its bond into court, and since nothing is shown to the contrary, we must presume that the officers of the court acted regularly, and in pursuance of the decision the amount was paid into court, and by this act the court held appellee entitled to this fund against appellants and entered the decree accordingly.

There is no creditor represented here, or in any way involved, and the only question to be decided is which one of the contesting parties have a prior equity in this fund.

## ARGUMENT.

The appellee claims its superiority and right to subrogation through its contract of suretyship, while the appellants hold that an assignment made by Henningsen ten months after the execution of the contract of suretyship gives them a superior equity. Appellee was ordered by the lower court to pay the penal amount of its bond, and the certificate of that court (Record, p. 69) shows that it paid the full penalty into said court, which satisfied the laborers and materialmen.

### I.

What are the rights of the parties?

**The assignment made by Henningsen to Spencer is void under the Revised Statutes, §3477 and 3737, as against the rights of third persons.**

*Greenville Savings Bank et al. vs. Lawrence*, 76 Fed. 545.

*United States vs. Gillis*, 95 U. S. 407.

*Spawford vs. Kirk*, 97 U. S. 484.

The appellant bank occupies no better position than a general creditor. It was under no obligation to lend this money, and there is no proof that any part of it was used on the contract in question. The money was passed to the credit of Henningsen (p. 52), and checked out to whom and for what no one seems to know, and as far as this fund is concerned the bank is a stranger and a mere volunteer.

*Emmert vs. Thompson*, 52 N. W. 31.

*Sheldon on Subrogation*, §240.

*Aetna Life Ins. Co. vs. Middleport*, 124 U. S. 534.

"The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another." There is no paying a debt in the present case, simply a loan. Its equity, if it has any, in the fund in question, dates from the day of the assignments.

The dealings between Henningsen and Spencer were very similar to the dealings of the parties in the *Greenville Savings Bank et al. vs. Lawrence et al.* (76 Fed. 545), and the court, in commenting upon this phase of the case, says:

"It is further urged, that as the money advanced by the bank and Mr. Norwood was loaned to be used, and was used, by Lawrence, in most part, to pay current labor and material claims during the progress of the building, they

should be subrogated to the rights which those persons would have had if they had not been paid.

"The proof shows that the loans were made by the bank to Lawrence upon his promissory notes in the ordinary course of business. The amounts were put to his credit, and he drew the money as he chose. He stated the purpose for which he needed the loans, and he agreed to secure them by securing to the bank as far as he could the payments he expected from the government. The bank did not pay the laborers or material men. Lawrence paid them and extinguished their claims. There was no intention to keep the claim alive for the protection of the bank. The bank relied upon the expectation of getting the government checks and being paid by Lawrence out of them, and not upon any agreement that the labor or material claims should be assigned to it."

The court then quotes from *Sheldon on Subrogation* as follows:

"The doctrine of subrogation is not upheld for the mere stranger of volunteer who has paid the debt of another without any assignment or agreement for subrogation without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property of his own."

The court applying this doctrine held that this manner of dealing gave the bank no equity in the fund as against creditors. In the cast just quoted from, the contract contained a provision reserving a certain amount for the protection of creditors, but it would seem no different in principal when considering the legal effect of such a loan as to this fund whether the right to the fund arises by reason of a contract stipulation or by implication of law, as in the case at bar, so the bank is a stranger to this fund.

II.

On the other hand, this appellee, by admitting its liability and paying the full penalty of its bond into court, comes into court with clean hands. It did equity and to all intents and purposes occupies the same position in a court of equity as a surety who had finished a contract or had already paid the contractors' bills. That is, it is entitled to assert the doctrine of subrogation and has a prior equity in this fund. The doctrine of subrogation does not depend as appellants seem to think, on a lien.

*Aetna Life Ins. Co. vs. Middleport*, 124 U. S. 534.

*Matthews vs. Fidelity Title & Trust Co.*, 52 Fed. 687.

*Memphis & Little Rick R. R. Co. vs. Dow*, 120 U. S. 287.

"The right of subrogation is not founded on a contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice and is independent of contractual relations between the parties."

*Emmert vs. Thompson*, 52 N. W. 31.

"It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay."

From the principles set forth in these cases and from the facts in this case there can only be one conclusion. This appellee is entitled to assert the doctrine of subrogation.

*Prairie State Bank vs. U. S.*, 164 U. S. 227.

*First National Bank of Seattle vs. City Trust, Safe Deposit Co.*, 114 Fed. 529.

The only difference in the case at bar and the two cases just cited is that in those cases the sureties finished the contract, while in this case the surety paid the penalty of its bond into court from which the laborers and materialmen were evidently satisfied. There is no difference in the equitable principles involved. In the cases above cited, as in all cases where there is a default involved, the contractors left unpaid bills as well as unfinished work, and if the contention of the appellant be true, then in those cases the surety would have been subrogated to only so much of the money as might be necessary to complete the work and free the government, and that the balance would go to the creditors existing at the time of the default. This distinction has never been made by the courts, but the surety is subrogated to the whole fund regardless of the fact whether the whole thereof was necessary to complete the work, or whether it is necessary to be used in the payment of debts created and unpaid by the defaulting contractor. Subrogation is for the benefit of the surety and not for the benefit of the obligee in the bond, and in the present case the obligation of the surety is dual, and the surety is as much liable for the payment of the indebtedness as it is for the completion of the contract, and the equity of the surety in the fund is created by the contract of suretyship and exists in favor of the surety

against the contractor and his assignees until the surety is released. It is founded upon equitable principles, aside from the set rules of subrogation, and that in condering the priority of equities, the equity of the surety dated back to the execution of the contract of suretyship; that the surety has the benefit of all the securities in the hands of the creditors and that the principal cannot by any action whatsoever defeat or limit that right; also "that a stipulation in the building contract for the retention, until the completion of the work, of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that is, that it raises an equity in the surety in the fund to be created * * * " and after reviewing the authorities and cases both in England and in this country, concludes: "Sundberg & Company could not transfer to the bank any greater rights in the fund than they themselves possessed. Their rights were subordinate to those of the United States and the sureties.."

*Prairie State National Bank vs. United States*, 164 U. S. 227.

This rule will doubtless govern this appeal, and it is supported by the great weight of authority.

See also *Finney vs. Condon*, 86 Ill. 78.

Appellant concedes the point that if the contractor defaulted as to the construction of the building, the ap-

pellee's position would be secure. By the same reasoning and the same equitable principles, the default being as to the laborers and materialmen, appellee is subrogated to the rights of the creditors in this fund.

*Greenville Savings Bank vs. Lawrence*, 76 Fed. 545.
*Lawrence vs. U. S.*, 71 Fed. 228.
*Reed vs. Pauly*, 121 Fed. 652.

In the latter case the court says:

"Where indemnitors of sureties on the bond of a contractor for the erection of a county building were compelled to pay judgments against the contractor, who was subsequently declared a bankrupt, such indemnitors were entitled to an equitable lien on the balance due from the county to the bankrupt, which the trustee subsequently recovered, to the amount of the judgment so paid."—Quotation from syllabus.

This principal should be the rule applied in this case and under it the appellee would have an equitable lien upon this fund, which is superior to that of general creditors, of which the bank must be regarded as one.

*Prairie State Bank vs. U. S.*, 164 U. S. 227.
*Finney vs. Condon*, 86 Ill. 78.

*Richards Brick Company vs. Bothell*, 18 *Appeal Cases, D. C.*, 516, is squarely in point. There the contractors made an assignment of a balance due them from the government to apply the principal part of the proceeds to the payment of their general creditors. It was held that sureties, who had signed their bond as required by law, conditioned for the payment of all persons supply-

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ing labor and materials, might maintain an action to prevent the application of the amounts due to the payment of general creditors until all claims, for which recourse might be had to the sureties had been fully paid, and that a receiver would be appointed to prevent such misapplication.

On page 537 the court deals with the relation of the creditors of a government contractor and the relation of sureties of the contractor to the unpaid portion of the contract price while it is in the hands of the government, and holds that the act providing for bonds upon government contracts bears every evidence that it was intended to provide a security for laborers and materialmen on which they could confidently rely for protection, and reasons that because of that fact by necessary implication an equitable lien and preference is secured in favor of the parties furnishing labor and materials in the execution of a contract upon that portion of the contract price remaining unpaid, and the case further holds that the government holds the funds as a *quasi* trustee for the benefit of those entitled to receive it under the conditions of the bond, and the court then says:

"This right to preference being the result of the operation of the statute and the condition of the bond, it is the clear right, upon the plainest principles of justice, of the sureties in the bond to invoke a court of equity to enforce the preference and equitable lien for their protection."

The court sustains this doctrine by reference to the case of *Marble Co. vs. Burgdorf*, 13 Appel. D. C., 506, 519.

The court, in its opinion on the following page (p. 538), holds that a contractor cannot by a subsequent agreement, assignment or power of attorney displace or impair this lien or preference right on the part of the creditors and sureties in favor of general creditors, and on page 543 of the same opinion the court, in discussing the preference right of a person, who by indorsing the contractors' note enabled them to obtain money for use in and which was actually used in the execution of the contract, overrules the lower court and holds that such a person is but a general creditor and bears no particular relation to the fund in question, so that this case holds—

1. That a creditor of a government contractor has an equitable lien and preference in the unpaid part of the contract price.

2. That this preference and lien cannot be displaced or impaired by any act on part of the contractors.

3. That a surety upon a contractor's bond may be subrogated to the rights of the creditor or may institute an action to have the unpaid part of the purchase price applied upon the claim of creditors, and

4. That a person standing in a more favorable position than the appellant bank in this case has no rights in such a fund as against the creditors of the particular contract or the surety upon the contract bond.

It will be observed that in this as in other cases discussed the money advanced was actually used in the performance of the contract, while in the case at bar the

money advanced by the bank was not, so far as the record shows, used in the promotion of the contract.

From the principles laid down in the foregoing cases it is clear that this appellee has the right to assert the doctrine of subrogation; that it has a prior equity in the fund in question; that it is entitled to all the security which would otherwise go to its principal and all of its principal's means and remedies; and that the appellants have no equity in this fund.

III.

The appellants' first contention that appellee is not entitled to assert the right of subrogation is not well founded. They insist that there "must be something in the nature of a lien." Such is not the law. This doctrine is a creation of equity to see that substantial justice is done by one who in good conscience ought to do it.

*Aetna Life Ins. Co. vs. Middleport*, 124 U. S. 534.

*Memphis & Little Rock R. R. Co. vs. Dow*, 120 U. S. 287.

*Emmert vs. Thompson*, 52 N. W. 31.

*Prairie State Bank vs. U. S.*, 164 U. S. 227, and cases cited.

This court has decided, however, in *Prairie State Bank vs. U. S.*, "That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the work

as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created."

*Finney vs. Condon*, 86 Ill. 78.

None of the cases cited on page 16 of appellants' brief sustains their argument. The appellants argue from those cases that the surety completed the contract, or the contract provided that a certain per cent. should be held until laborers and materialmen had been paid. They argue from the facts and circumstances of those cases and not from the principles upon which they were decided. This appellee contends that this case is within the principles of all of those cases.

The cases of *U. S. vs. Rundell* and *U. S. vs. National Surety Company* distinctly hold that the bond under 28 *Statutes* 278, c. 280, affords full protection to all persons who supplied material or labor in the construction of public buildings and gave them a right of action against the surety. In this case the surety paid the persons whom this act was to protect, and since this court has held in the *Prairie State Bank case* that the surety had an equitable right in the per cent. retained, there can be but one equitable conclusion, and that is that this appellee is entitled to assert the doctrine of subrogation.

The cases cited on page 21 of appellants' brief, with the exception of *Lawrence vs. U. S.*, deal with mechanic's liens, which this appellee admits never existed; that class

of liens deal not with the compensation of the contractor, but with the object or structure upon which the labor was bestowed.

*Lawrence vs. U. S.* specifically denies any right of the appellant bank to this fund, for the dealings of the bank in that case were the same as in this, and the court says the loaning of the money to the contractor was purely voluntary and the bank had no enforcible rights.

It is a sufficient answer to appellants' second contention, that the right of subrogation does not arise until the laborers and materialmen have been paid, to state that this appellee came into court with clean hands—it admitted its liability; it commenced an action against Henningsen and Clive and their creditors to ascertain who was entitled to the money due from it. This alone amounted to an assumption of Henningsen's debts to the amount of the bond. It paid the penalty of its bond into court. It did equity and occupies in this action the very position that the appellants say that it should.

The memorandum decision of the court below was based upon this principle and required this appellee to pay the full penalty of its bond into court.

Were the appellants to prevail upon this technical point it would avail them nothing. The court would do no more than require a compliance with the memorandum decision of the lower court, requiring it to make a conditional decree, by which the money would be paid to the

appellee upon it paying into court the penal amount of its bond, and this amount having already been paid in and distributed among the creditors, the appellee would be entitled to the same decree that now appears upon record, for certainly the surety would be entitled to have this money kept available until such time as it could by some proceeding protect itself in the payment of its bond obligation.

In the case of *City of Keokuk vs. Love,* reported in 31 Iowa, page 119, on page 124 the court says:

"It is further claimed by the appellee's counsel that the right of subrogation cannot exist until the sureties have paid the obligation of their principal; that such payment was not made when the judgment was entered in this case, and hence they had then no right to be subrogated, and their subsequent payment could give them no claim for a reversal in this court, which must review the case tried, and not decide a new one. All this is answered by the single proposition that the power of a court of equity is not limited to settling rights of parties upon what has been done in the past, but it reaches over and declares their rights for the future, and in the exercise of this latter power it could have decreed that when the sureties paid the debts of their principal they should be subrogated to the rights of the creditor."

We contend that we are within the rule of subrogation as laid down by this court in *Aetna Life Ins. Co. vs. Middleport* and *Prairie State Bank vs. U. S.*

The other cases cited by appellants in support of their contention on this point only attempt to state the general rule as applying to the facts before them, and all the cases cited were cases in which the creditor was en-

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forcing the obligations for which the surety was liable, and the surety was seeking as against the unpaid creditor, subrogation to a portion of his rights or remedies, or cases in which a creditor was enforcing an obligation against a subject matter to which the suretyship related, and the surety was seeking to establish by subrogation a lien upon the same object matter, equal or superior in rank to that of the creditors.

In the case of *James vs. Day*, cited by appellants, Day purchased a farm of James and gave a purchase price mortgage back to James. Day subsequently sold the farm to Close, Close assuming and agreeing to pay the said purchase price mortgage. Close became insolvent. Day paid interest upon the mortgage, his own obligation, and in a foreclosure suit by James, Day sought as against James to establish a lien upon the mortgaged premises for such interest payments equal in rank to Day's mortgage, reasoning that when Close assumed to pay the mortgage his position was chaged to that of surety and the interest payment entitled him to subrogation. This was purely a contest between creditor and the surety on his (surety's) obligation.

The case of *Vert vs. Voss*, also cited by appellants, involved the rights of the surety as against the rights of the creditor, and in this case, as well as in the preceding case, the surety was liable, not for a fixed amount, but for

the whole debt, and is clearly distinguishable from the case at bar.

The case of *Conwell vs. McCowan*, cited by appellants, is very similar to the foregoing cases, and was a case in which the surety, without paying any part of a mortgage indebtedness, sought to foreclose the same as against the person holding the mortgage, and whose indemnitor he was.

In the case of *Columbia Finance and Trust Co. vs. Kentucky Union Railway Co.*, cited by appellants, the surety upon a mortgage note paid interest upon the note, and the question discussed was whether this surety, having paid an installment of interest, would be entitled to subrogation to the rights of the creditors to such an extent that he would have an equal lien with his creditor upon the mortgaged property.

So in none of the cases cited by the appellants to sustain their contention did the surety discharge his whole obligation, nor were any of them contests between a surety and his principal or the successor of the principal.

The third point urged by appellants that appellee has assumed inconsistent positions has no merit. The claimants in the court below had elected to secure relief from the surety. When they saw this fund saved they tried to intervene. This appellee argued by this election they had no equity, and the Circuit Court so decided. The cases cited by appellants in brief on page 29 have no application.

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Appellants' fourth assignment of error in that the certificate from the lower court should not have been considered is unimportant. The certificate simply shows that equity had been done. It did not change the record. It showed that the suit mentioned in the complaint had been terminated and that the complainants had been satisfied, and if the bank has no interest in the payment of those claims it cannot raise this point.

The case of *Hudgins vs. Kemp*, 18 How. 530, cited by appellants, holds that a certificate is inadmissible to impeach the record. This certificate surely did not impeach the record in any way, nor change the equity of the respective parties.

The fifth argument of appellants that the court erred in extending the subrogation beyond the reserved per cent. is not well founded in law.

*Rodes vs. Crockett*, 24 Am. Dec. 489.

"Sureties who have paid the debt for which they were security may reach in equity any fund set apart by the principal debtor for the payment of such debt, no matter who the trustee or *cestui qui trust* is."

We urge the true rule, as between the surety and his principal and likewise as between the surety and any assignee of his principal, to be that upon paying any part of the principal debt, the surety is entitled to be subrogated to all the securities, funds, liens and equities of the creditor.

*Fisher vs. B. & L. Assn.*, 59 Missouri Appeals 430.

*Gedye vs. Matson*, 25 Beav. 310.

*Motley vs. Harris*, 1 Lea. (Tennessee) 577.

*Sheldon on Subrogation*, Sec. 510.

*Mechanics' Savings Bank vs. Scoggin*, 52 S. W. 718.

*Nettleton vs. Ramsay*, 40 Am. St. Rep. 342.

The court in the case of *Fisher vs. B. & L. Assn.*, *supra*, says:

"The case then is this: The Building and Loan Association held a note (already proved up and allowed in the Probate Court) for about $2,400 against the estate of Dr. Fisher. The plaintiff, Mrs. Fisher, was surety on this note, and as such she paid to the association $1,600. She claims, by reason thereof, the right to stand in the shoes of the association and partake of the dividends from the estate in proportion to the amount she had so paid. The general principle is well understood 'that a surety, on paying the debt of his principal, is entitled to be subrogated to all securities, funds, liens and equities which the creditor holds against the principal debtor, or as a means of enforcing payment from him.' *Sheldon on Subrogation*, Sec. 86. The same learned author further says, 'that it is in the nature of a purchase by the surety from the creditor. It operates in equity as an assignment of the debt and the securities to the surety.' Sec. 87.

"But in opposition to the right here, it is earnestly insisted that the plaintiff cannot be subrogated to any of the rights or securities of the Building Association held by it against the Fisher estate, for the reason that she had not paid the entire debt; that the right of subrogation does not exist until the surety shall have paid or satisfied the whole debt.

"The principle here contended for is, in the abstract, correct. As between the creditor and surety, the latter has no right upon a partial payment of the debt to come in and share the securities with the creditor. The creditor has the right to insist upon retaining all rights and means of indemnity until the whole of his claim against

the principal debtor shall have been satisfied. *Ames vs. Huse*, 55 Mo. App. 422. But this is a matter entirely between the surety and the creditor holding the securities; the principal debtor and other creditors can make no such objection to the right of subrogation. As to them, it is immaterial whether the surety has or has not completely satisfied the debt. If the creditor holding the securities shall see proper to admit the surety, who has made a partial payment, to a proportionate share therein, it does no legal or equitable wrong to their interests and they can not be heard to object."

The case of *ex parte Rushford*, 10 Vessey 409, was a case in which the brother of Rushford became his surety in the sum of $10,000 in favor of Seaton & Co., bankers, to indemnify themselves against advances to Rushford. Rushford became insolvent, and it developed that advances made to him by his bankers were greatly in excess of $10,000, and amounted to about $20,000. The surety paid to the bankers, the penal amount of his bond, and in the bankruptcy proceedings, in a contest between himself and the bankers, the surety was pronounced entitled to subrogation, and entitled to a proportionate part with the bankers of the dividends.

The fact that appellee has an equitable right in the fund and that this court has decided that its equity dated from the execution of its bond annuls appellants' sixth contention.

*Prairie State Bank vs. U. S.*, 164 U. S. 227.
*Finney vs. Condon*, 86 Ill. 78.

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Such being the case, the assignment to Spencer would be void under Revised Statutes 3477 and 3737, so that the cases cited by appellants on page 33 have no application.

The appellants' brief does not state any positive law or authority by which they have any right to the fund in question.

The cases and authorities cited, coupled with the facts in the case at bar, show that this appellee was entitled to assert the doctrine of subrogation; that it had a prior equity in the fund; and that the appellants had no equity.

The decree of the Circuit Court and the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HAROLD PRESTON,
CARROLL B. GRAVES,
EDWARD B. PALMER,
JAMES B. MURPHY,
*Solicitors for Appellee.*

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78.

No. 361

IN THE

# Supreme Court of the United States

B. M. HENNINGSEN and EDWARD W. CLEVE, co-partners, THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and E. R. SPENCER,

*Plaintiffs in Error,*

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY, BRYANT LUMBER & SHINGLE MILL COMPANY (a corporation), CARSTENS PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. BINHAM, co-partners as E. C. MacDOUGALL & COMPANY, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

*Defendants in Error.*

APPEAL FROM THE CIRCUIT COURT OF APPEALS NINTH CIRCUIT

## Brief of Defendants in Error—On Motion to Dismiss

HAROLD PRESTON,
CARROLL B. GRAVES,
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IN THE

# Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and R. R. SPENCER,

*Plaintiffs in Error,*

*vs.*

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER & SHINGLE MILL COMPANY (a corporation), CARSTENS PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. BINHAM, co-partners as E. C. MacDOUGALL & COMPANY, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

*Defendants in Error.*

APPEAL FROM THE CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

## Brief of Defendants in Error--On Motion to Dismiss

HAROLD PRESTON,
CARROLL B. GRAVES,
E. B. PALMER,
JAMES B. MURPHY,
*Counsel for Defendants in Error.*

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*Defendants in Error.*

Comes now the above entitled defendant, the United States Fidelity & Guaranty Company, and moves the court to dismiss the appeal in the above entitled cause and to enter a judgment of dismissal therein.

This motion is planted upon the ground that the judgment of the Circuit Court of Appeals herein is final and this cause is not reviewable by this court and because this court has no jurisdiction of this cause.

This motion is based upon the record herein and for reasons therefor we respectfully submit:

I.

That the jurisdiction of the Circuit Court, the court in which this action was originally instituted, was dependent entirely upon the opposite parties to the suit being citizens of different states.

II.

Because there is no where in this action involved really and substantially a dispute as to the effect or construction of a federal statute upon the determination of which depends the result of the action.

III.

Because the only discussion of a federal statute was incidentally drawn into question after the institution and determination of this action by the Circuit Court and its relation is immaterial.

IV.

The defendant in error moves the court for a judgment affirming the judgment of the Circuit Court of Appeals for the reason and upon the ground that although the record made shows that this court has jurisdiction, it is manifest that the appeal in this cause was taken for delay only or that the question upon which the jurisdic-

tion of this court depends is so frivolous as not to need further argument.

Dated this 12th day of December, 1906.

Respectfully submitted,

HAROLD PRESTON,
CARROLL B. GRAVES,
E. B. PALMER,
JAMES B. MURPHY,

IN THE

# Supreme Court of the United States

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*Defendants in Error.*

APPEAL FROM THE CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

## BRIEF ON MOTION TO DISMISS APPEAL

### STATEMENT OF THE CASE.

This was an action originally brought by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as complainant against R. M. Henningsen and

W. Clive, co-partners, the National Bank of Commerce, a corporation, and R. R. Spencer, as defendants, in the United States Circuit Court for the District of Washington, Northern Division, for the purpose of restraining the defendants from accepting money due from the United States upon a construction contract and delivering it to the National Bank of Commerce in satisfaction of an indebtedness existing in favor of the bank and against Henningsen and Clive, and bases its right for an injunction upon the fact that it had become surety upon the statutory bond of Henningsen and Clive conditioned that they, as contractors, would perform their contract and pay for material, etc., used in the performance of their contract, and that the said Henningsen and Clive had failed to perform their said contract in that they failed and neglected to pay for material and labor furnished in the performance of the same and the complainant therein was compelled to and did pay, on account of said claims, the full penalty of its bond and was therefore subrogated to the rights of the claimants and entitled to receive the balance due upon its contract as against the bank, who was alleged to be a general creditor.

The defendants in said action resisted the claim of the Guaranty Company upon the ground that they had an assignment of these moneys from Henningsen and Clive and were authorized by a power of attorney executed by the said Henningsen and Clive to collect the unpaid

amount of said contract price and apply the same on account of the bank's indebtedness. The jurisdiction of the Circuit Court was originally invoked upon the ground of diverse citizenship (see original complaint, page 3, and amended and supplemental bill of complaint, page 28). The only reference in the bill of complaint or the supplemental complaint to a federal statute or the construction of a federal statute is found in paragraph VI of the original complaint on page 4 of the record, and in paragraph VI of the amended and supplemental bill of complaint appearing on page 29 of the record. The only words used in either of said paragraphs is that Henningsen and Clive "contrary to the statute of the United States in that behalf provided and contrary to the provisions of said contract made, executed and delivered to the defendant The National Bank of Commerce of Seattle, or to the defendant, R. R. Spencer, as trustee for the benefit of said bank a pretended written assignment of all moneys due, or which might thereafter become due, from the United States to said contractors under and by virtue of the terms of said contract."

Testimony was taken and the cause was submitted to the Circuit Court for its decision and the Circuit Court no where passed upon the validity of the assignment or the construction of a federal statute, but it will appear from the memorandum decision on the merits appearing at page 56 of the record that the court based its decision

entirely upon the relative merits of the equities created by the execution of the bond and the assignments, and holds in effect that a defaulting contractor could not defeat this equitable right created by the signing of the bond by an assignment of the payments to be made by the government.

It is true that when the case came to the Circuit Court of Appeals the surety company endeavored to strengthen its position by attacking the assignment to the bank as contrary to the federal statute and the bank attempted to avoid the application of the statute contended for by the surety company, and the Circuit Court of Appeals passed upon this question presented to it, holding that in view of the federal statute the assignment to the bank was void.

We believe it is apparent, however, from its opinion that the Circuit Court of Appeals did not predicate this decision upon the validity or invalidity of the assignment by Henningsen to Spencer, but upon the fact that the claim of the surety company was prior in time and therefore was a superior equity to that of the bank; the bank being under no obligation to make loans or advance money to Henningsen at the time it did and made them with knowledge that the surety company's claim was prior and superior to its own.

## POINTS AND AUTHORITIES.

This action does not arise under the Constitution or

laws of the United States as is contended by the plaintiff's in error.

I.

In all cases in which the jurisdiction is dependent entirely upon diverse citizenship the judgment of the Circuit Court of Appeals is final. Section 6, Judiciary Act of March 3, 1891.

The jurisdiction here referred to is the jurisdiction of the Circuit Court and in determining the grounds upon which the jurisdiction of the Circuit Court was originally invoked, reference must be made to the bill of complaint alone. By reference to the record it will be seen that the jurisdictional clause is contained in paragraph 2 of the original bill of complaint and in the corresponding paragraph of the amended and supplemental bill of complaint. In each of these the jurisdiction of the Circuit Court is invoked upon the sole and only ground of diverse citizenship. In paragraph XI of the supplemental complaint (record page 32) this allegation is made "that by reason of the diverse citizenship of the complainant and each and all of said defendants and by reason of the fact that the amount involved in said suit exceeds the sum of $2,000 this court has full and complete jurisdiction of said suits for all purposes." It seems evident from these references that the jurisdiction of the Circuit Court was originally predicated upon diverse citizenship.

It is true that in paragraph 6 of the original bill of

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complaint (record page 4) and paragraph 6 of the amended and supplemental bill of complaint( record page 29) the complainant alleges upon information and belief that an assignment was made or attempted contrary to the statutes of the United States in that behalf provided. This allegation is not in the jurisdictional clause and the allegation has no reference to the jurisdiction court. If such an allegation were material to the plaintiff's cause of action it could not be held to be the pleading of a federal statute so as to raise its construction or application under the established rules of pleading and in the examination of jurisdiction the court will consider only such facts as are well pleaded. The plaintiff's cause of action was predicated upon the relation of the principal and surety and upon the equitable rule that the principal was about to deprive, by some method, the surety of the securities which were legally his and whether that was to be accomplished on the part of the principal by that of assignment, by gift, fraud or unlawful preference made no difference if there had been no assessment and only an intention and voluntary attempt to pay a general creditor out of the funds the effect would be the same. The effect of the allegation is only that the surety was about to be deprived of its indemnity. The allegation in the complaint to this effect was nothing more than anticipating the defense of the defendant. Such cannot give the court jurisdiction nor can the fact that the defendant in the Circuit Court invokes the protection, benefit or construc-

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tion of the statute aid the plaintiff in error. In the case of *Press Publishing Co. vs. Monroe*, 164 U. S. 105, the court says:

"The judgment of the Circuit Court of Appeals being made final in all cases in which the jurisdiction of the Circuit Court is dependent entirely upon the parties being citizens of different states, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1,000.00 the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or was one in which the jurisdiction of the Circuit Court wholly depended upon the parties being citizens of different states.

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2,000 showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different states. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Cent. Consol. Min. Co. vs. Turck*, 150 U. S. 138 (37:1030), is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

"The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the Circuit Court of Appeals was final and the writ of error must be dismissed for want of jurisdiction."

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This court, in considering a motion to dismiss in the case of *Florida Central & Pen. R. R. Co. vs. Bell* (176 U. S. 326), says:

"This question must be answered upon the inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that the plaintiffs invoked the jurisdiction of the court because the parties were citizens of different states, or because of the case was alleged to be one arising under the constitution, laws or treaties of the United States?"

And again in the same opinion the court says:

"It must be regarded as conclusively established by our decisions that the jurisdiction of the Circuit Court must appear in the plaintiff's statement of their case.

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance."

* * * * * * * *

The paragraph of the declaration which sets forth the plaintiff's claim is as follows:

"The plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and

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prosecuted by the heirs of Louis Bell and his heirs, the plaintiffs, in said land office; and upon appeal in the General Land Office of the government and upon and from an appeal from the decision of the Commissioner of the said General Land Office to the Secretary of the Interior of the United States, the said heirs prosecuted the pre-emption claim, until by the order and decision of the said Secretary the said patent was granted."

* * * * * * * *

"It is obvious that all that is added by these allegations to the plaintiffs' statement of their own claim is a statement of what the defendant claimed before and at the time of the commencement of this suit in respect to its own title. The plaintiffs were not pretending to have title under the act of May 17, 1856, however it might be construed. That act was, under the allegations of declaration, the source of the defendant's title, but it could not affect the plaintiffs' title unless it were pleaded and set up by the defendant. It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a federal question, cannot create jurisdiction in a Circuit Court by anticipating the defendant's claim, and by alleging that the defendant will set up a defense under some law of the United States."

To the same effect see *American Sugar Refining Company versus New Orleans*, 181 U. S. 277.

Referring to the question of good pleading this court, in the case of *Arbuckle vs. Blackburn*, 191 U. S. 405, says:

"After a jurisdictional clause setting forth diversity of citizenship, the bill averred that by an act of the General Assembly of the State of Ohio, passed in the year 1884, entitled 'An Act to Provide Against the Adulteration of Food and Drugs,' as amended by an act passed in the year 1890, entitled "An Act to Amend Section 3 of an Act Entitled 'An Act to Provide Against the Adultera-

tion of Food and Drugs' Passed March 20, 1884," which act was still in full force and virtue, it was provided that no person should, within the State of Ohio, manufacture for sale, offer for sale, or sell, any article of food which was adulterated within the meaning of said act, and that the term 'food' used therein should include all articles used for food or drink by man, whether simple, mixed or compound."

* * * * * * * *

"In the present case the Circuit Court had jurisdiction on the ground of diverse citizenship; but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.

"The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is required in good pleading. *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63, and cases cited."

II.

If the construction of a statute is involved or if the court concludes that the Circuit Court and the Circuit Court of Appeals accepted the pleadings as arising the construction of a statute and the complainant, the defendant in error, was so benefited by the same that it should not now be heard to urge this point upon appeal to this court, then we urge that there is no assignment of error which sufficiently raises the question to give this court jurisdiction. The only reference to it in the assignment

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of errors is error No. 7, which reads as follows:

"In the absence of any right to the fund on the part of the complainant, the court erred in holding that the respondent bank was not entitled to retain the same both by reason of the consent of the other defendants by their answer, and by virtue of the assignment to Spencer for the use of the bank which was good as between the parties, and only void as against the government of the United States, and those subrogated to its rights."

The alleged error pointed out in the sub-division is that the bank was entitled to retain the money, both by reason of the consent of the other defendants and by virtue of the assignment. In the absence of any rights to the fund by the defendant in error this assignment does not specifically point out any statute relied upon or which is to be construed in connection with said assignment, nor does it assign as an error the wrongful construction of a statute by the Circuit Court of Appeals.

Respectfully submitted,

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JAMES B. MURPHY,
*Counsel for Defendants in Error.*

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# HENNINGSEN *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 78. Argued December 16, 17, 1907.—Decided February 24, 1908.

Although diversity of citizenship is alleged in the bill, if the grounds of the suit and relief are also based on statutes of the United States, which, as in this case, are necessarily elements of the decision of the Circuit Court of Appeals, an appeal lies from the judgment of that court to this court.

The equity of the surety on a bond given by a contractor under the act of August 13, 1894, 28 Stat. 278, who by reason of the contractor's default has been obliged to pay material-men and laborers, is superior to that of a bank loaning money to the contractor, secured by assignments of amounts to become due. In such a case the surety is subrogated to the rights of the contractor, but the bank is not.

143 Fed. Rep. 810, affirmed.

R. M. HENNINGSEN and Edward W. Clive, as copartners, in May, 1903, contracted with the United States for the construction of certain buildings at Fort Lawton, in the State of Washington, and entered into a bond with the United States Fidelity and Guaranty Company of Baltimore (hereinafter called the Guaranty Company) as surety in the penal sum of $11,625 for the faithful performance of the contract, and to "promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract." The buildings were constructed in accordance with the terms of the contract, but the contractors failed to pay certain just and lawful claims for labor and materials, amounting in the aggregate to $15,409.04. After such default the Guaranty Company instituted a suit in the United States Circuit Court for the District of Washington, in which it made the contractors and all persons to whom they were indebted for labor and materials defendants, confessing its own liability to the full amount of the bond. A decree was entered, adjudging the

company liable to such creditors of the contractors in the full sum of the bond, $11,625, and awarding payment to such creditors *pro rata*. It also adjudged that upon such payment the liability of the company upon the bond should be discharged. On March 16, 1904, pending the performance of the contract, the contractor, or rather Henningsen alone, for Clive had ceased to have any connection with the performance of the contract, made a written assignment of all payments which were then due, or might thereafter become due on account of the contract, to R. R. Spencer, in trust for the National Bank of Commerce of Seattle, to secure payment of a loan made by the bank to the contractors, October 10, 1903, of $3,500, and also subsequent loans, and at the same time gave as further security an order addressed to the United States quartermaster, requesting him to deliver to said Spencer all checks of the Government on account of said contract. The moneys so loaned were paid directly by the bank to Henningsen and handled and disbursed by him, without any supervision or control upon the part of the bank or Spencer. This suit was commenced by the Guaranty Company by a bill in the Circuit Court of the United States for the District of Washington to restrain the appellants from collecting or accepting the balance due on the contract from the United States. It appeared at the time of the commencement of the suit that there was in the hands of the quartermaster, due upon the contract, the sum of $13,066, which he was about to pay to Spencer under the assignment and order. On June 17, 1904, an arrangement was made between the parties, by which the sum of $8,024.21 was paid to certain creditors, and the balance, $5,041.79, was applied in conditional payment of the indebtedness of the contractors to the bank, with a stipulation that if it should be finally determined that the Guaranty Company was entitled to receive it then the bank should pay it to the Guaranty Company. This suit proceeded to a decree in favor of the Guaranty Company for $5,041.79, which decree was affirmed by the Circuit Court of Appeals. (February 12, 1906; 143 Fed. Rep. 810;

74 C. C. A. 484.) The bond of the Guaranty Company was given under the requirements of the act of Congress of August 13, 1894, c. 280 (28 Stat. 278), which reads:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: *Provided*, That such action and prosecution shall involve the United States in no expense."

*Mr. George E. de Steigner*, with whom *Mr. W. W. Wilshire* was on the brief, for appellants:

The contract, so far as the United States is concerned, had been fully performed, so that there was no right of the Government to which the surety company could be subrogated; the creditors furnishing labor and material had no lien upon the fund, and therefore there was no right in their favor to which the surety company could be subrogated; therefore the War Department was entitled to pay it to the contractors or to their assignee, the bank, and either the contractors or the bank

was entitled to receive it. Therefore the Circuit Court of Appeals was in error in stating that "the real question in the case is one of priority of equities as between the bank and the surety company." The real question is whether the surety company had any equity whatsoever.

It must recover, if at all, on the strength of its own right. This right must be something more than the general right of a creditor to be paid. It must be something in the nature of a lien, legal or equitable, upon the particular fund. *Prairie State Bank* v. *United States*, 164 U. S. 227; *First National Bank* v. *City Trust Company*, 114 Fed. Rep. 529; *Greenville Savings Bank* v. *Lawrence*, 76 Fed. Rep. 545; *Lawrence* v. *United States*, 71 Fed. Rep. 228; *Reid* v. *Pauly*, 121 Fed. Rep. 652; *Richard Brick Company* v. *Rothwell*, 18 App. D. C. 516.

The decision in each case was founded upon the fact, either that the contractors had failed to perform their contract and the sureties had completed the performance thereof for the Government, or that the contract provided for the retention of a portion of the contract price until laborers and material-men were paid. In the present case, neither of these facts is found. The original contractors finished the work for the Government; and the contract contained no stipulation for retaining any part of the amount due for the payment of laborers and material-men. There is, therefore, no default of which the Government can take advantage. So far as it is concerned, the contract has been fully performed. *United States* v. *Rundle*, 100 Fed. Rep. 400; *United States* v. *National Surety Co.*, 92 Fed. Rep. 549.

There was no right or equity left in the United States to which the complainant could be subrogated. *Liles* v. *Rogers*, 113 N. Car. 197.

The laborers and material-men never had any right to the fund. Aside from some statutory or contract provision, laborers or material-men have no claim, legal or equitable, either against the property improved, or the contract price. *Lawrence* v. *United States*, 71 Fed. Rep. 228; *Canal Co.* v. *Gor-*

*don*, 6 Wall. 561, 571; *Withrow Lumber Co.* v. *Glasgow Investment Co.*, 101 Fed. Rep. 863–868; *Mechanics' Bank* v. *Winant*, 1 N. Y. S. 659–660; *Randolph* v. *New York*, 53 How. Pr. 68; Phillips on Mechanics' Liens, § 1; 20 Am. & Eng. Enc. Law (2d ed.), 269, 293.

Of course, in no case is there such a claim in the case of public property. 20 Am. & Eng. Enc. Law (2d ed.), 295.

The complainant cannot be subrogated to any rights of the Government, because the contract had been fully performed and the Government had lost all interest in the retention of the fund; and the complainant cannot be subrogated to the rights of the laborers or material-men, because the fund was not retained for their benefit and they have no interest therein to which the right of subrogation can attach.

*Mr. James B. Murphy*, with whom *Mr. Harold Preston*, *Mr. Carroll B. Graves* and *Mr. Edward B. Palmer* were on the brief, for appellees:

The assignment made by Henningsen to Spencer is void under Rev. Stat., §§ 3477, 3737, as against the rights of third persons. *Greenville Savings Bank et al.* v. *Lawrence*, 76 Fed. Rep. 545; *United States* v. *Gillis*, 95 U. S. 407; *Spawford* v. *Kirk*, 97 U. S. 484.

The appellant bank occupies no better position than a general creditor. It was under no obligation to lend this money, and there is no proof that any part of it was used on the contract in question. The money was passed to the credit of Henningsen, and checked out to whom and for what no one seems to know, and as far as this fund is concerned the bank is a stranger and a mere volunteer. *Emmert* v. *Thompson*, 52 N. W. Rep. 31; Sheldon on Subrogation, § 240; *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534.

On the other hand, this appellee, by admitting its liability and paying the full penalty of its bond into court, comes into court with clean hands. It did equity and to all intents and purposes occupies the same position in a court of equity as a

surety who had finished a contract or had already paid the contractors' bills. That is, it is entitled to assert the doctrine of subrogation and has a prior equity in this fund. The doctrine of subrogation does not depend on a lien. *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534; *Matthews* v. *Fidelity Trust Co.*, 52 Fed. Rep. 687; *Memphis & Little Rock R. R. Co.* v. *Dow*, 120 U. S. 287; *Emmert* v. *Thompson*, 52 N. W. Rep. 31; *Prairie State Bank* v. *United States*, 164 U. S. 227; *First National Bank* v. *City Trust Co.*, 114 Fed. Rep. 529.

The appellants' contention that appellee is not entitled to assert the right of subrogation is not well founded. They insist that there "must be something in the nature of a lien." Such is not the law. This doctrine is a creation of equity to see that substantial justice is done by one who in good conscience ought to do it. *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534; *Memphis & Little Rock R. R. Co.* v. *Dow*, 120 U. S. 287; *Emmert* v. *Thompson*, 52 N. W. Rep. 31; *Prairie State Bank* v. *United States*, 164 U. S. 227, and cases cited.

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

A motion is made to dismiss on the ground that the jurisdiction of the Circuit Court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements. *Howard* v. *United States*, 184 U. S. 676; *Warner* v. *Searle & Hereth Co.*, 191 U. S. 195, 205.

Passing to the merits of the case, the question turns upon the respective equities of the parties. Appellants concede that the bank was not by the making of the loans to Henningsen entitled to subrogation to the rights, if any, of the United

States or the laborers or material-men, and also that if the Guaranty Company is entitled to subrogation to any right of the United States Government arising through the building contract, the bank can make no claim by reason of the assignment.

Henningsen, for we may leave Clive out of consideration, entered into a contract with the United States to construct buildings. The Guaranty Company was surety on that contract. Its stipulation was not merely that the contractor should construct the buildings, but that he should pay promptly and in full all persons supplying labor and material in the prosecution of the work contracted for. He did not make this payment, and the Guaranty Company, as surety, was compelled to and did make the payment. Is its equity superior to that of one who simply loaned money to the contractor to be by him used as he saw fit, either in the performance of his building contract or in any other way? We think it is. It paid the laborers and material-men and thus released the contractor from his obligations to them, and to the same extent released the Government from all equitable obligations to see that the laborers and supply men were paid. It did this not as a volunteer but by reason of contract obligations entered into before the commencement of the work. *Prairie State Bank* v. *United States*, 164 U. S. 227, is in point. In that case Sundberg & Co., in 1888, contracted with the Government to build a custom-house at Galveston. Hitchcock was surety on that contract. On February 3, 1890, in consideration of advances made and to be made by the Prairie Bank, Sundberg & Co. gave a power of attorney to a representative of the bank to receive from the United States the final payment under the contract. In May, 1890, Sundberg & Co. defaulted in the performance of this contract and Hitchcock, as surety, without any knowledge of the alleged rights of the bank, assumed the completion of the contract and disbursed therein about $15,000 in excess of the current payments from the Government. In a contest between Hitchcock and the Prairie Bank it was held that Hitchcock had the superior equity, and the judgment of the Court of Claims in his favor

for the amount still due from the Government was affirmed. The bank loaned to Sundberg & Co. about $6,000 prior to the time that they defaulted in the performance of their contract and prior to any action by Hitchcock in completing the contract or in paying out money, so that the bank actually parted with $6,000 of its money before Hitchcock parted with any of his. It was held that Hitchcock's equity commenced with his obligation in 1888 to see that Sundberg & Co. duly performed their contract with the Government. Mr. Justice WHITE, delivering the opinion of the court, reviewed the authorities at length and discussed the question fully. He said (p. 232):

"Under the principles thus governing subrogation, it is clear whilst Hitchcock was entitled to subrogation, the bank was not. The former in making his payments discharged an obligation due by Sundberg, for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock s subrogation must be considered as arising from and relating back to the date of the original contract or as taking its origin solely from the date of the advance by him."

It seems unnecessary to again review the authorities. It is sufficient to say that we agree with the views of the Circuit Court of Appeals, expressed in its opinion, in the present case:

"Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation; but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money. *Prairie State Bank*

v. *United States*, 164 U. S. 227; *Insurance Company* v. *Middleport*, 124 U. S. 534; Sheldon on Subrogation, § 240." See also *United States Fidelity Co.* v. *Kenyon*, 204 U. S. 349, 356, 357.

The decree of the Circuit Court of Appeals is

*Affirmed.*

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MILLER, PLAINTIFF IN ERROR, v. THE STATE OF